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No. 86-1013-CFX  
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Docketed:  
December 19, 1986

Title: Richard E. Lyng, Secretary of Agriculture, et al.,  
Petitioners  
v.  
Northwest Indian Cemetery Protective Association, et  
al.

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Miles, Marilyn B., Sherwood, Michael  
R., Walz, Edna

Entry	Date	Note	Proceedings and Orders
16	Apr 17 1986		Relisted by Justice Scalia for April 24, 1987
17	Apr 20 1986		REDISTRIBUTED. April 24, 1987
1	Oct 8 1986		Application for extension of time to file petition and order granting same until November 19, 1986 (O'Connor, October 9, 1986).
2	Nov 12 1986		Application for further extension of time to file petition and order granting same until December 19, 1986 (O'Connor, November 13, 1986).
3	Dec 19 1986	G	Petition for writ of certiorari filed.
5	Jan 12 1987		Order extending time to file response to petition until February 28, 1987.
6	Jan 16 1987		The above extension applies to all respondents.
18	Jan 21 1987	G	Motion of Howenquet Community Association, et al. for leave to file a brief as amici curiae filed.
10	Feb 20 1987		Order extending time to file response to petition until March 27, 1987.
11	Feb 20 1987		Above extension applies to all respondents.
12	Feb 25 1987		Brief of respondents Northwest Indian Assn., et al. in opposition filed.
13	Mar 27 1987		Brief of respondent California in opposition filed.
14	Apr 1 1987		DISTRIBUTED. April 17, 1987
15	Apr 14 1987	X	Reply brief of petitioners Lyng, Sec. of Ag., et al. filed.
0	Apr 17 1987		Relisted by Justice Scalia for April 24, 1987
19	Apr 24 1987		Relisted by the Chief Justice for May 1, 1987
20	Apr 27 1987		REDISTRIBUTED. May 1, 1987
21	May 4 1987		Motion of Howenquet Community Association, et al. for leave to file a brief as amici curiae GRANTED.
22	May 4 1987		Petition GRANTED. *****
24	Jun 17 1987		Order extending time to file brief of petitioner on the merits until July 18, 1987.
25	Jul 16 1987		Order further extending time to file brief of petitioner on the merits until July 28, 1987.
26	Jul 17 1987		Brief amici curiae of Howenquet Community Assn., et al. filed.
27	Jul 18 1987		Brief amicus curiae of Williams, AZ filed.
28	Jul 28 1987		Brief of petitioners Lyng, Sec. of Ag., et al. filed.

Entry	Date	Note	Proceedings and Orders
29	Jul 28 1987	Brief amici curiae of Colorado Mining Assn., et al. filed.	
30	Jul 28 1987	Brief amici curiae of Hawaii, et al. filed.	
31	Aug 6 1987	Joint appendix filed.	
33	Aug 14 1987	Order extending time to file brief of respondent on the merits until October 2, 1987.	
34	Sep 21 1987	Order further extending time to file brief of respondent on the merits until October 22, 1987.	
35	Oct 9 1987	SET FOR ARGUMENT. Monday, November 30, 1987. (1st case)	
36	Oct 22 1987	Brief amici curiae of Natl. Congress of American Indians filed.	
37	Oct 22 1987	Brief amici curiae of Christian Legal Society, et al filed.	
38	Oct 22 1987	Brief of respondent California filed.	
39	Oct 22 1987	Brief of respondents Northwest Indian Assn., et al. filed.	
40	Oct 22 1987	Brief amici curiae of ACLU, et al. filed.	
41	Oct 22 1987	Brief amici curiae of American Jewish Congress, et al. filed.	
43	Oct 29 1987	D Motion of respondents for leave to file out-of-time motion for divided argument filed.	
42	Oct 30 1987	CIRCULATED.	
44	Nov 9 1987	Motion of respondents for leave to file out-of-time motion for divided argument DENIED.	
45	Nov 20 1987	X Reply brief of petitioners Lyng, Sec. of Agriculture, et al. filed.	
46	Nov 30 1987	ARGUED.	

**PETITION  
FOR WRIT OF  
CERTIORARI**

86-1013<sup>(1)</sup>

Supreme Court, U.S.  
FILED

DEC 19 1986

No.

JOSEPH T. SPENCER, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

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**RICHARD E. LYG,**  
**SECRETARY OF AGRICULTURE, ET AL., PETITIONERS**

v.

**NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.**

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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14014

#### **QUESTION PRESENTED**

Whether the government's decision to reconstruct the final six-mile segment of a 55-mile road located in a portion of a national forest that has religious significance for members of three Indian Tribes and its decision to permit logging within that same area of the forest violate the Tribe members' rights under the Free Exercise Clause of the First Amendment.



## PARTIES TO THE PROCEEDING

In addition to the petitioner listed in the caption, R. Max Peterson, Chief of the United States Forest Service; Zane G. Smith, Jr., Regional Forester for Region Five, United States Forest Service; the United States Forest Service; and the United States of America were defendants in the district court and are petitioners in this Court. In addition to the respondent listed in the caption, the plaintiffs in the district court were Sierra Club, The Wilderness Society, California Trout, Siskiyou Mountains Resource Council, Redwood Region Audubon Society, Northcoast Environmental Center, Jimmie James, Sam Jones, Lowana Branter, Christopher H. Peters, Timothy McKay, John Amodio, and the State of California. All of these parties are respondents in this Court.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1986

No.

RICHARD E. LYNG,  
SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

The Solicitor General, on behalf of the Secretary of Agriculture; the Chief of the United States Forest Service; the Regional Forester, Region Five, United States Forest Service; the United States Forest Service; and the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The decision of the court of appeals on rehearing (App., *infra*, 1a-37a) is reported at 795 F.2d 688. The prior decision of the court of appeals (App., *infra*, 38a-52a) is reported at 764 F.2d 581. The decision of the district court (App., *infra*, 53a-91a) is reported at 565 F. Supp. 586. The prior decision of the district court denying respondents' motion for a preliminary injunction (App., *infra*, 92a-102a) is reported at 552 F. Supp. 951.

**JURISDICTION**

The judgment of the court of appeals was entered on July 22, 1986. On October 9, 1986, Justice O'Connor issued an order extending the time for filing a petition for



a writ of certiorari to and including November 19, 1986; on November 13, 1986, Justice O'Connor issued an order further extending the time for filing a petition to and including December 19, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

### STATEMENT

1. This case concerns the limitations imposed by the Free Exercise Clause of the First Amendment upon the federal government's authority to manage public lands. The Six Rivers National Forest, which consists of approximately 956,000 acres in northwestern California, was created in 1947. See 12 Fed. Reg. 3647 (1947); 61 Stat. 1070. The particular portion of Six Rivers National Forest involved in the present case consists of parts of the Blue Creek Planning Unit and the Eight-Mile Planning Unit, which are located in the northern section of the forest between the Smith and Klamath Rivers. App., *infra*, 3a. None of this land ever formed part of an Indian Reservation, and no Indian treaty imposes a trust duty upon the United States with respect to this land.

a. In the 1930s, the United States Forest Service converted the routes through this area that had been used by miners and other travelers over the previous century into more formal trails and low-standard roads. With the growth of the timber industry in the 1950s and 1960s, the Forest Service recognized the need for an improved road network. It therefore began to upgrade a series of unpaved roads connecting the towns of Gasquet and Orleans. This project, termed the "G-O" (Gasquet to Orleans) road,

totals 75 miles in length. Twenty miles are located on non-federal land and maintained by Del Norte County; the remaining 55 miles are located within Six Rivers National Forest. The purpose of the G-O road is to provide a route for hauling the large amount of timber that may be harvested in this portion of the forest. The upgraded road also is designed to enhance the public's access to this area of the national forest and serves other management purposes, including fire control.

The Forest Service has spent \$17 million to upgrade 49 of the 55 miles of the G-O road that are located on federal land. A six-mile portion of the road sandwiched between the upgraded segments—the Chimney Rock section—remains unpaved. This section of the road is now accessible for only six months of the year.

In 1977, the Forest Service issued a draft environmental impact statement (EIS) discussing alternative proposals for upgrading the Chimney Rock section of the G-O road. The Advisory Council on Historic Preservation responded to the draft EIS by requesting information as to whether sites within the area were eligible for inclusion in the National Register of Historic Places. App., *infra*, 4a, 55a. The Forest Service commissioned a study on Indian cultural and religious sites in the Chimney Rock area, which was prepared by Dr. Dorothea Theodoratus and completed in 1979. See *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* [hereinafter cited as Theodoratus Report].

The report concluded that the Chimney Rock area was situated in the "high country," an area considered sacred by the Yurok, Karok, and Tolowa Indians. The district court found (App., *infra*, 58a (footnote omitted)):

The Indian plaintiffs' use of the high country for religious purposes is not in dispute. Ceremonial use of the high country by the Yurok, Karok, and Tolowa tribes dates back to the early nineteenth century \* \* \*

and probably much earlier. Members of these tribes currently make regular use of the high country for several religious purposes. Individuals hike into the high country and use "prayer seats" located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal "power" through "engaging in emotional [and] spiritual exchange with the creator." \* \* \* Such exchange is made possible by the solitude, quietness, and pristine environment found in the high country. Certain key participants in tribal religious ceremonies such as the White Deerskin and Jump Dances must visit the high country prior to the ceremony to purify themselves and to make "preparatory medicine." \* \* \* The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community. \* \* \* Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicine. \* \* \* They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances.

The report identified the specific sites in the Chimney Rock area at which these rituals currently are performed, as well as sites of archeological significance. The report found that it is a tenet of the Indians' religion that the effectiveness of the rituals depends upon the maintenance of the entire high country in its natural state.

After considering the report, the Forest Service asked the keeper of the National Register of Historic Places to add to the register a 17,500 acre district containing areas of spiritual value to the Yurok, Karok, and Tolowa Indians. See generally 16 U.S.C. 470a. A 13,500 acre district was included in the register. App., *infra*, 85a.

On March 2, 1982, the Forest Service issued a final EIS addressing the proposed reconstruction of the Chimney Rock section of the G-O road (App., *infra*, 56a). The regional forester issued a decision on the same date selecting one of the alternative routes for the reconstruction of this section of the road. The forester noted that "[t]his alternative is the farthest removed from contemporary spiritual sites; thus, the adverse audible intrusions associated with the road would be less than all other alternatives" (Record of Decision, Mar. 2, 1982, at 2). He also noted that "[a]ccess to the historic sites and areas of religious practice is not being deprived. Some native people may feel access is enhanced. Individual sites are known and will not be disturbed. Mitigation measures will reduce audio and visual effects. Native people will not have exclusive use within the protective areas, but the natural environment will remain undisturbed. New roads and trails will not be permitted in these areas" (*id.* at 4).<sup>1</sup>

The regional forester rejected the alternative of not upgrading the Chimney Rock section and leaving the G-O road incomplete. He noted that "[t]he multiple-use benefits and opportunities provided by the G-O Road are very significant to the development of the timber and recreation resources and to the economies of Del Norte and Humboldt counties. Public interest was expressed by a favorable ballot in Del Norte County in June 1980 in support of the G-O Road. Plans for completion of the road

<sup>1</sup> The regional forester also noted that "[t]he effect [of the reconstructed road] on archaeological sites would be indirect in nature. There would be no ground disturbing activities near archaeological properties. Being lower on the slope, there would be fewer adverse visual impacts" (Record of Decision at 2). The regional forester acknowledged that the Chimney Rock section of the G-O road would traverse the district proposed by the Forest Service for inclusion in the National Register of Historic Places. He concluded that the "[e]ffects of the road on the District have been mitigated" by the road location and other ameliorative measures. *Id.* at 3.



have been known for over 20 years and construction of the first segments started in 1963" (Record of Decision at 3). Accordingly, "[a] decision not to reconstruct the existing road \*\*\* would deprive the general public of many benefits and unnecessarily limit their use of the area" (*id.* at 4). The Forest Service authorized the construction of the Chimney Rock road project in July 1982.

b. At the same time that the Forest Service was considering proposals for upgrading the Chimney Rock section of the G-O road, it was developing a multiple use management plan and environmental impact statement for portions of the Blue Creek and Eight-Mile Planning Units that are largely roadless, undeveloped forest.<sup>2</sup> The final EIS was issued in 1975 and, on October 19, 1976, the forest supervisor adopted a management plan permitting the harvest of 929 million board feet of timber over 80 years. App., *infra*, 3a-4a, 55a.

Respondents appealed that decision to the regional forester. On February 19, 1981, the regional forester acted on the appeal, directing the forest supervisor to reduce the proposed timber harvest by 21% to 733 million board feet. The modification rested in part upon the Indian religious and cultural considerations identified in the Theodoratus Report. For example, all harvesting and other management activities were prohibited within a one-half mile radius of Indian religious sites. The chief of the Forest Service denied an appeal of the regional forester's decision. On January 8, 1982, the Forest Service adopted the modified management plan. App., *infra*, 4a, 55a, 59a.

2. Respondents—an Indian cultural and religious organization, individual Indians, environmental organiza-

<sup>2</sup> The Multiple-Use Sustained-Yield Act of 1960 directs the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (16 U.S.C. 529).

tions, individual members of those organizations, and the State of California—commenced actions in the United States District Court for the Northern District of California challenging the Forest Service's decisions to complete construction of the G-O road and adopt the management plan. Respondents asserted that the Forest Service's actions violated the Free Exercise Clause of the First Amendment, the Clean Water Act, the National Environmental Policy Act, and a variety of other statutes.<sup>3</sup> The district court denied respondents' motion for a preliminary injunction barring construction of the G-O road (App., *infra*, 92a-102a).

Following a trial, the district court entered judgment in favor of respondents. App., *infra*, 53a-91a. With respect to respondents' claim under the Free Exercise Clause, the district court observed that the Forest Service's actions would not intrude upon the actual sites of Indian religious ceremonies (*id.* at 59a). It noted that respondents' claim was that "construction of the Chimney Rock Section would violate the sacred qualities of the high country and impair its successful use for religious purposes" (*id.* at 58a). Thus, respondents asserted that the visibility of the road and the noise from the road would "impair the success of religious and medicinal quests into the high country" (*id.* at 59a (footnote omitted)). In addition, "religious use of the area would be impaired by increased recreational use resulting from construction of the Chimney Rock Section" (*ibid.*).

<sup>3</sup> Respondents also alleged violations of the American Indian Freedom of Religion Act of 1978, 42 U.S.C. 1996; the Wilderness Act, 16 U.S.C. 1131 *et seq.*; the Administrative Procedure Act, 5 U.S.C. 706; the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*; the National Forest Management Act, 16 U.S.C. 1600 *et seq.*; and water and fishing treaty rights reserved to Indians living on the Hoopa Valley Indian Reservation. App., *infra*, 4a.

The district court found that "[t]he evidence establishes that construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indian [respondents'] use of the high country for religious practices" because those activities would "seriously damage the \* \* \* visual, aural, and environmental qualities of the high country" (App., *infra*, 63a, 64a-65a). That effect, the district court found, constituted a burden on the Indian respondents' free exercise of religion (*id.* at 65a-66a).

The district court went on to conclude that the reasons underlying these government actions were insufficient to justify the burden on respondents' free exercise rights. It first stated that "[c]onstruction of the Chimney Rock Section would not materially serve several of the claimed government interests" (App., *infra*, 66a). Thus, it found that timber could be harvested without construction of the road; that the road would simply transfer jobs from Humboldt County to Del Norte County, not increase the number of jobs in the timber industry; and that increased recreational access was not relevant because "although recreational access to the area by means of motor vehicles would be somewhat improved, resulting environmental degradation would decrease the area's suitability for primitive recreational use" (*id.* at 67a).

The court stated that any increase in the efficiency of Forest Service administration resulting from the construction of the road could not justify the infringement of respondents' free exercise rights, noting that the relevant administrative services "are efficiently provided at present" (App., *infra*, 68a). It observed that the Forest Service's claim that construction of the road would increase competition in the timber industry was "too speculative" to outweigh the burden on respondents' free exercise rights (*ibid.*). Finally, the court stated that "[p]ast investment of resources in existing paved sections of the G-O road does

not justify construction of the Chimney Rock Section. Those sections of the G-O road provide improved and useful access to vast recreational, timber, and other resources in the region" (*ibid.*).<sup>4</sup>

The district court next found that both the draft and final environmental impact statements regarding construction of the Chimney Rock section of the G-O road did not satisfy the requirements of the National Environmental Policy Act because they

- (1) fail sufficiently to disclose the impact of the road construction on water quality; (2) fail to discuss the cumulative impact of the road construction and implementation of the Management Plan on water quality; and (3) fail adequately to describe what measures would be taken to mitigate adverse impacts on water quality.

App., *infra*, 75a. The court also found that the environmental impact statement regarding the management plan was deficient in its discussion of the effect of the plan on water quality (*id.* at 81a-87a).<sup>5</sup>

Finally, the district court concluded that the construction of the road and implementation of the management plan would violate the Clean Water Act. It found that both actions would increase sediment levels in Blue Creek above the level permitted under state water quality standards (App., *infra*, 87a).<sup>6</sup>

<sup>4</sup> The court also found that the government's interest in increasing the harvest of timber did not justify the burden on free exercise rights that would result from implementation of the management plan (App., *infra*, 68a-69a).

<sup>5</sup> The court rejected a variety of other challenges to the sufficiency of the environmental impact statements (App., *infra*, 71a-75a, 80a-81a). It also concluded that the management plan EIS was deficient because it failed to properly assess the impact of the plan on the area's wilderness resource potential (*id.* at 82a-85a).

<sup>6</sup> The court rejected respondents' claims under the American Indian Religious Freedom Act (App., *infra*, 70a-71a); the National Historic



On the basis of these legal conclusions, the court entered an injunction barring the government from constructing the Chimney Rock section of the G-O road and implementing the management plan (App., *infra*, 91a).

3. While the case was pending before the court of appeals, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 *et seq.* This statute designates most of Six Rivers National Forest as a wilderness area (98 Stat. 1621-1624). Since commercial activities are prohibited in wilderness areas (16 U.S.C. 1133(c)), much of the timber harvesting enjoined by the district court on First Amendment grounds is prohibited under the statute. The statute expressly exempts a narrow strip of land from the wilderness designation "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." S. Rep. 98-582, 98th Cong., 2d Sess. 29 (1984); see also H.R. Rep. 98-40, 98th Cong., 1st Sess. 32 (1983).

The court of appeals panel issued a decision on June 24, 1985, affirming the district court's decision in part and vacating in part (App., *infra*, 38a-52a). The government filed a petition for rehearing and suggestion for rehearing en banc. The panel granted the petition for rehearing, withdrew its initial decision, and issued a new decision (*id.* at 1a-2a).

4. The court of appeals' decision on rehearing affirmed the district court in part by a divided vote (App., *infra*, 3a-37a). The majority first upheld the district court's conclusion that construction of the G-O road and implementation of the forest management plan would in-

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Preservation Act (*id.* at 85a-86a); the Multiple-Use Sustained-Yield Act (*id.* at 89a); and the National Forest Management Act (*ibid.*). The court held (*id.* at 88a) that the proposed government actions violated water and fishing rights reserved to Indians on the Hoopa Valley Indian Reservation. The court also found (*id.* at 88a-89a) that the other violations constituted violations of the Administrative Procedure Act.

terfere with the Indian respondents' rights under the Free Exercise Clause.<sup>7</sup> It observed that the evidence in the record showed that "the high country is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the 'power' that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use" (*id.* at 9a (footnotes omitted)). Quoting the Theodoratus Report, the court of appeals found that the construction of the G-O road would "produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities" because of the "degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities" (*id.* at 10a). The court noted that "much of the adverse impact would be indirect, from increased uses made possible by the Road," but nonetheless concluded that "the Road would interfere with the free exercise of [respondents'] religion" (*ibid.*).<sup>8</sup>

The court of appeals found that no compelling government interests justified construction of the road. The court stated (App., *infra*, 15a):

There was testimony that completion of the road and logging in the high country would increase employment in Del Norte County, but that this benefit would simply represent a shift of work from elsewhere in the

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<sup>7</sup> The court noted that "[b]ecause most of the high country has now been designated by Congress as a wilderness area, the issue of logging becomes less significant, although it does not disappear" (App., *infra*, 9a).

<sup>8</sup> The court rejected the contention that the district court's order barring construction of the road and implementation of the management plan violated the Establishment Clause (App., *infra*, 11a-13a).

state. There would be no statewide net gain in employment. There was evidence that forest management functions would be made easier by the road. There was evidence that the road would also provide greater recreation access to the area, but the projected use was not large. In our view, the government has fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian [respondents'] free exercise rights.

The court of appeals upheld the district court's finding that the environmental impact statements were insufficient because they did not adequately discuss water quality issues (App., *infra*, 15a-18a). It also concluded that the Forest Service projects would violate applicable state water quality standards if they "were implemented as described in the EISs" (*id.* at 19a).<sup>9</sup>

Judge Beezer dissented with respect to the free exercise issue (App., *infra*, 22a-37a). He observed that the Theodoratus Report found that construction of the road would have five effects upon Indian religious practices and—after evaluating each alleged adverse effect—concluded that they "did not justify the issuance of an injunction against the construction of the road" (*id.* at 29a). He found that "[t]hree of the five potential adverse effects

<sup>9</sup> The court of appeals held that the district court had erred by considering whether the Forest Service projects would breach the government's trust responsibilities to Indians living on the Hoopa Valley Indian Reservation. It found that "[b]ecause the Hoopa Valley Tribe was not a party to this action, \* \* \* this case [was not] an appropriate vehicle in which to determine the range and extent of the trust responsibility owed to the Tribe" (App., *infra*, 19a n.10). It therefore vacated the part of the injunction resting on that portion of the district court's opinion (*ibid.*).

The court of appeals further noted that enactment of the California Wilderness Act had rendered moot the portion of the district court's order directing the Forest Service to study the wilderness potential of the area covered by the management plan. The court therefore also vacated that part of the district court's order. App., *infra*, 20a.

cited in the report—logging, mining, and recreational use[s]—cannot support issuance of an injunction against road construction" because they could be eliminated by less drastic means and, in the case of recreational activities, did not present a threat "of constitutional magnitude" (*id.* at 32a). He further found that "[t]he remaining two potential adverse effects—road construction activities off the right-of-way and Forest Service activities—do not pose a serious threat to the practice of the Indian plaintiffs' religion" because they could be prevented by other means (*ibid.*).

Judge Beezer also rejected the other adverse effects cited by respondents. He found that the claim "that visibility of the road from religious sites would impair \* \* \* religious practices" lacked merit in view of the measures proposed by the Forest Service to mitigate the visual impact of the road (App., *infra*, 33a). With respect to the argument that the road would result in increased noise, Judge Beezer observed that "[w]hile it is possible that noise from the road would impair religious and medicinal quests in the area adjoining the road, it is apparent that the high country is a large area. The Indian plaintiffs have not established that their quests can take place only in the area near the road" (*id.* at 34a). Since the completion of the G-O road would not seriously impair respondents' religious practices, Judge Beezer would have reversed the district court's order granting the injunction.

Judge Beezer stated that in light of the passage of the California Wilderness Act, "[t]he first amendment issues raised by the proposed development of the newly designated wilderness areas [were] moot" (App., *infra*, 35a). Since it was "not clear whether the district court would have issued an injunction [barring implementation of the management plan] based upon the development of the re-



maintaining small parcels," he concluded that a remand was appropriate "to allow the district court to reevaluate its injunction in light of the Act" (*ibid.*).

#### REASONS FOR GRANTING THE PETITION

As the dissenting judge below observed, "[t]he district court's order was the first decision restricting the government's ability to develop public lands on the basis of the free exercise clause" (App., *infra*, 37a). The court of appeals' unprecedented decision affirming that order, and thereby flatly prohibiting the government from undertaking the land management actions at issue here, conflicts with the decisions of several other courts of appeals, each of which has refused to grant relief when presented with a similar challenge grounded in the Free Exercise Clause. Respondents do not contend that the government has forced them to act in a manner that is contrary to their religious principles. Nor is it asserted that the government has explicitly prohibited any form of religious practice or prevented respondents from visiting areas of the national forest that they view as spiritually significant. Respondents instead seek to require the government to exercise its authority to manage the public lands in a manner that will effectuate respondents' own religious practice. This Court's decision last Term in *Bowen v. Roy*, No. 84-780 (June 11, 1986), indicates that, absent governmental compulsion or prohibition as to an individual's religious belief or practice, attempts to dictate the government's conduct of its affairs and management of its property in order to enhance the practice of a particular religion cannot be justified under the Free Exercise Clause.

The court of appeals also erred in failing to accord any weight to the justifications advanced in support of the land management decisions at issue here. The government has broad authority to administer federally-owned lands

in the public interest; the exercise of that authority requires evaluation of a variety of conflicting proposals and interests in order to ascertain the best use of each unique piece of government property. The manner in which the government has resolved conflicting demands relating to a particular piece of federal land should carry special weight. This is particularly true where, as here, the government has made substantial efforts to adjust its plans to accommodate religious beliefs. The decision below ignores these concerns and dramatically reduces the government's authority to utilize the vast amount of land owned by the federal government in the manner that best accords with the public interest. Review by this Court is plainly warranted.

1. The decision below squarely conflicts with the decisions of other courts of appeals rejecting free exercise claims virtually identical to the claim asserted by respondents here. In each of these other cases, the Indian plaintiffs alleged that the use of federally-owned land proposed by the government would violate their religious beliefs; the courts of appeals uniformly refused to require the government to conform its actions to the plaintiffs' religious beliefs.

For example, in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), the plaintiffs—the Hopi Tribe, the Navajo Medicinemen's Association, and other Navajos—challenged the proposed development of the San Francisco Peaks, a geological formation located in the Coconino National Forest. The court noted that the Peaks play a central role in both the Hopi and Navajo religions; they are viewed as the home of deities and are the site of religious ceremonies. A portion of the Peaks had been used for downhill skiing since 1937 and the Forest Service proposed to construct additional ski facilities. The plaintiffs argued that the proposed development was "inconsistent with their First Amendment right

freely to hold and practice their religious beliefs" because as a consequence of such development "the Peaks would lose their healing power and otherwise cease to benefit the tribes" and the tribes' "ability to pray and conduct ceremonies upon the Peaks" would be impaired (*id.* at 739-740 (footnote omitted)).

The court of appeals held that the plaintiffs had not established a violation of the Free Exercise Clause. It first found that the Clause was not implicated by the plaintiffs' claim that the proposed government action would "desecrate and destroy the spiritual character of a religion's most sacred shrine" and \* \* \* thereby force practitioners 'to fundamentally modify their religious doctrine to conform to the changed circumstances' " (708 F.2d at 741). The court observed that "[m]any government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion" (*ibid.*). The court concluded that "[t]he construction [of the recreation facility] approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim" (*id.* at 742 (footnote omitted)).

Turning to the plaintiffs' claim that the construction of the skiing facility would burden their practice of religion by barring them from a portion of the Peaks, the court held that "plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site" (708 F.2d at 744 (footnote omitted)). It concluded that the plaintiffs had not made out a free exercise claim because the development would not bar them from any area of the Peaks that was indispensable to the practice of their religion (*ibid.*).

The same analysis was applied in *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd* on opinion below, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983). That case concerned Bear Butte, a geological formation designated as a park by the State of South Dakota. The Indian plaintiffs alleged that "Bear Butte is the most powerful ceremonial site for the religious practices of the Lakota and Tsistsistas people" (541 F. Supp. at 787). They asserted that the construction of access roads, parking lots, and viewing platforms near the geological foundation "destroy[ed] the sanctity and power of the religious ceremonies and violate[d] their right to exercise freely their religious beliefs" (*id.* at 788). The court held that the plaintiffs failed to establish a violation of the Free Exercise Clause, holding that the Clause did not require the State "to waive [its] statutory power to manage and develop the state park in the public interest. Instead, we conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out" (*id.* at 791). The court also rejected the plaintiffs' claim that the State was required to prevent tourists from engaging in conduct that vitiated the sanctity of Bear Butte, holding that the State had not "burdened the exercise of [the] plaintiffs' religion by 'allowing' tourists to act on occasion in a manner which does not conform to the dictates of [the] plaintiffs' religion" (*id.* at 792).<sup>10</sup>

<sup>10</sup> Similar claims were rejected in *Badoni v. Higginson*, 638 F.2d 172, 178-180 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), where the court concluded that the relief sought by the Indian plaintiffs—management of a monument in accordance with their religious beliefs—would amount to a violation of the Establishment Clause. See also *Sequoyah v. TVA*, 620 F.2d 1159, 1163-1165 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (where worship at a particular site was not central to religious ceremonies and practices, flooding of that site did



These courts flatly rejected free exercise claims asserting that proposed government action would disturb the natural environment and thereby vitiate the sanctity of a particular geographic area. The court below, on the other hand, found a violation of the Free Exercise Clause *solely because* the challenged government actions would degrade the natural environment and thereby render respondents' religious rituals ineffective (App., *infra*, 10a). There is thus a square conflict among the courts of appeals concerning whether asserted disruptive effects not involving denial of access to a religious site on public land can suffice under the Free Exercise Clause to prevent the carrying out of land management decisions reached through normal governmental processes.<sup>11</sup>

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not implicate an interest protected by the Free Exercise Clause); *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982), *aff'd* on other grounds, 746 F.2d 570 (1984), *cert. denied*, No. 84-1801 (Oct. 7, 1985).

<sup>11</sup> The court below asserted that it was utilizing the same standard as the other courts of appeals, and justified its contrary result by finding that the intrusions upon the Blue Creek high country would destroy the Indians' core religious beliefs and practices (App., *infra*, 7a-8a & n.4). The court's proffered distinction rests upon a fundamental misunderstanding of the decisions of the other courts of appeals. These courts have divided the free exercise claims asserted by Indian plaintiffs into two distinct categories. The courts completely reject claims based upon the incompatibility of the proposed government action and the Indians' belief systems—the type of claim at issue here. With respect to claims based upon denial of access to religious sites, the courts apply a test examining the centrality of the site to the plaintiffs' religious beliefs. The court below applied this "centrality" test to the first type of claim, thereby adopting an approach contrary to that followed by the other courts of appeals that have considered the question.

2. Moreover, the court of appeals' determination is clearly incorrect. The Forest Service's decisions to complete construction of the G-O road and permit logging under the management plan do not violate the Free Exercise Clause.<sup>12</sup>

a. In addressing claims under the Free Exercise Clause, this Court has differentiated between action which has the effect of "prohibiting" the free exercise of religion and nondiscriminatory action which has the unintended effect of disadvantaging a religious practice. It is well-established that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental activity. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (plurality opinion). See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring); *Johnson v. Robison*, 415 U.S. 361, 383-386 (1974); *Gillette v. United States*, 401 U.S. 437, 461-462 (1971); see also *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878).

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<sup>12</sup> In our view, the court of appeals erred by reaching the merits of respondents' challenges to the logging plan because the 1984 wilderness designation bars timber harvesting and road construction in a large portion of the area covered by the plan. As Judge Beezer observed in his dissenting opinion (App., *infra*, 35a-36a), the proper course would have been to remand the issue to allow the district court to reconsider the issue in light of the 1984 designation. Since the course of action adopted by the court of appeals bars all logging in the area—even in those portions of the national forest not included in the wilderness designation—the Forest Service cannot adopt a narrower plan permitting logging in those areas not covered by the wilderness designation.

The government actions challenged here do not require respondents to abandon any of their religious practices. No element of religious ritual would be rendered unlawful or made more costly if the Forest Service were to carry out its plans, and respondents would not be denied access to any religious site. Respondents' contention thus differs from claims traditionally found to be encompassed within the Free Exercise Clause. Rather than challenging government action on the ground that it requires an individual to act in a manner that is inconsistent with his religious beliefs, or that it imposes a financial or other penalty on religious practice, respondents argue that their religious rituals would be rendered ineffective by the actions proposed by the Forest Service.

In *Bowen v. Roy*, *supra*, the plaintiff asserted that the government's use of a Social Security number to identify his daughter would "serve to 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power" (slip op. 2-3). Asserting a claim under the Free Exercise Clause, the plaintiff obtained an injunction barring the government from using the Social Security number issued in his daughter's name. Eight Justices joined in reversing this portion of the district court's judgment, holding that the plaintiff had not established a free exercise claim because "[t]he Federal Government's use of a Social Security number [for the plaintiff's daughter] does not itself in any degree impair [the plaintiff's] 'freedom to believe, express, and exercise' his religion" (*id.* at 7 (footnote omitted)).

The Court squarely rejected the argument that "the First Amendment [requires] the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family" (slip op. 6 (emphasis in original)). The Court stated (*ibid.*):

Just as the Government may not insist that [the plaintiffs] engage in any set form of religious observance,

so [the plaintiffs] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

Respondents' claim that the government's activities in Six Rivers National Forest violate the Free Exercise Clause because they threaten to vitiate the conditions necessary for effective religious ceremonies is similar to the claim in *Roy* that the government's use of the Social Security number would rob the plaintiff's daughter of her spirit. Both claims rest upon the notion that the Free Exercise Clause obligates the government to conduct itself and its affairs so as to minimize all incidental interferences with religion. Thus, the decision in *Roy* indicates that respondents' claim should be rejected here.<sup>13</sup>

<sup>13</sup> The court of appeals attempted to distinguish *Roy* on two grounds. First, it asserted that the plaintiff in *Roy* challenged the government conduct because it "offended his religious sensibilities," but that the Forest Service actions "would greatly impair religious exercises of [respondents] in the only place where they can be performed" (App., *infra*, 11a (footnote omitted)). The court's characterization of the claim in *Roy* is incorrect; as we have discussed, the plaintiff in that case asserted that use of the Social Security number would rob his daughter of her spirit and "prevent her from attaining greater spiritual power" (slip op. 3). That claim is very similar to respondents' contention that the Forest Service's actions would vitiate the sacred character of the high country. In both cases, the contention is that the government's failure to respect the tenets of the religion will cause spiritual harm.

The court of appeals' second basis for distinguishing *Roy* is that "logging and road-building on public lands, to which the public has



b. Weighing further against respondents' claim of a free exercise violation is the substantial interest of the Executive Branch in administering the public lands in a manner consonant with congressional directives and responsive to myriad competing public policy concerns, of which religious accommodation is only one. The Property Clause of the Constitution vests Congress with the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (U.S. Const. Art. IV, § 3, Cl. 2). Congress has exercised this authority by directing the Secretary of Agriculture to administer the national forests "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528; see also 16 U.S.C. 475. In addition, the Secretary must "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (16 U.S.C. 529).<sup>14</sup>

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access, is not the kind of internal government practice that the Court found beyond free exercise attack in *Roy*" (App., *infra*, 11a). Of course, the Social Security Administration's use of a Social Security number and the Forest Service's development of government lands are different in many ways, but the court of appeals never explained why they are relevantly different. In both instances the government undertakes actions in respect to property and procedures that are the government's to manage, and the complainant's objection relates to an effect on his religious interests that is produced by a spiritual nexus particular to his religious beliefs. Moreover, the Court in *Roy* did not rest its decision on the peculiar factual characteristics of the Social Security system, but upon the "distinction between individual and governmental conduct" (slip op. 7 n.6), observing that the Free Exercise Clause bars the government from prescribing the religious beliefs of individuals, but does not require the government to act in accordance with the religious beliefs of any individual (*id.* at 6).

<sup>14</sup> Similarly broad grants of authority govern the administration of other federally owned lands. See 16 U.S.C. 1600-1614; 43 U.S.C. 1700-1712, 1732.

Among other statutes bearing on the Forest Service's land management responsibilities, Congress in 1978 enacted the American Indian Religious Freedom Act, 42 U.S.C. 1996, which provides in part that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions." See *Wilson v. Block*, 708 F.2d at 746-747 (discussing requirements of American Indian Religious Freedom Act).

The government has a strong interest in ensuring that public lands are managed in the manner that best fulfills these statutory requirements. As Judge Beezer observed below, "[w]hile the government has many obligations that are not shared by private landowners, the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits" (App., *infra*, 36a). In determining the use that will be permitted with respect to a particular piece of property, the government must consider and evaluate a complex set of competing possibilities. There is a very strong governmental interest—to be overcome only in instances of constitutional necessity—that decisions arrived at through this administrative process be carried through. Indeed, nullification of such an administrative decision imposes a burden on the persons who otherwise would be benefitted by the proposed use of the property.

Moreover, there is no reason to suppose that in carrying out its complex multiple-use land management responsibilities, the Forest Service has abused its discretion or callously disregarded respondents' religious claims. The government decisions at issue here represent a reasonable accommodation between the interest of the government in furthering access to and productive uses of the national forests and the religious beliefs of respondents. The Forest

Service's decision to complete the G-O road was preceded by consideration of all relevant issues, including respondents' religious beliefs.

The Forest Service found the road to be justified by the government's interests in promoting the harvesting of timber, enhancing recreational access to federal lands, and efficient administration of the public lands. Before proceeding to complete the road, however, the Forest Service commissioned a comprehensive study of the Indians' religion and its relationship to the affected area, and adopted measures to mitigate the effect of the proposed actions upon the Indians' religious practices. The road construction plan chosen by the Forest Service is the alternative that impacts least upon religious sites. Indeed, as Judge Beezer showed in his dissenting opinion below (App., *infra*, 29a-34a), the construction of the road will have little effect upon respondents' religious practices. The decision therefore does not violate the Free Exercise Clause. Cf. *United States v. Lee*, 455 U.S. 225, 258-260 (1982).<sup>15</sup>

<sup>15</sup> In the courts below, the United States argued that acceding to respondents' demands would amount to an establishment of religion because they would impose a burden on persons who wish to use the road and adjacent public lands for logging, recreational, or other purposes. On further reflection, we conclude that there would be no Establishment Clause violation in this context. While the government is not constitutionally compelled to accede to the claims of respondents for religious accommodation, nevertheless a full measure of discretion rests with the political branches in seeking reasonable accommodation of competing claims to the use of public lands. Indeed, we believe that deference to claims such as those of respondents might well be shown as a matter of administrative discretion or mandated by statute as instances of the kind of governmental accommodation of religion, which, while not required by the Free Exercise Clause, is well clear of any prohibition imposed by the Establishment Clause. This Court has made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage." *Waltz v. Tax Commission*,

3. The question presented in this case is of considerable importance to the government's ability to manage federally-owned lands in accordance with the public interest. The government owns approximately 726 million acres of land located within the United States; 570 million acres is found in the Ninth Circuit. The proper management of this vast amount of land requires innumerable decisions regarding the permissible uses of particular sites as well as the construction of roads, trails, recreational facilities, and other projects. The rule adopted by the court below, if allowed to stand, would greatly affect the government's authority to make these decisions. Whenever the government were presented with a claim that a proposed action would have an incidental effect on any individual's complete realization of his or her spiritual development, the balancing of interests mandated by Congress would be replaced by a process in which undue weight is accorded to the accommodation of religious beliefs.<sup>16</sup>

397 U.S. 664, 673 (1970); see also *Bowen v. Roy*, slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace v. Jaffree*, No. 83-812 (June 4, 1985), slip op. 16 (O'Connor, J., concurring in the judgment); *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Gillette v. United States*, 401 U.S. 437, 453 (1971).

<sup>16</sup> Indeed, in *United States v. Means*, 627 F.Supp. 247 (D.S.D. 1985), the court relied on the decision of the district court in the present case in concluding that an Indian religious group was entitled on free exercise grounds "to a special use permit that would allow them to establish a religious camp" on an 800-acre site in a national forest (see 627 F. Supp. at 270). (We have not sought appellate review of this determination; the district court stated that its decision was not appealable (*id.* at 271-272).) The Forest Service and the Department of the Interior inform us that more than 30 other religion-based claims urging particular uses of federal land are now pending at various stages of the administrative process. These claims may be resolved in the administrative process. If they are not, however, the claimants may attempt to require the government to comply with their demands by invoking the interpretation of the Free Exercise Clause adopted by the court below.



Moreover, such claims presumably would not be limited to the traditional religions of Native Americans. It is difficult to see why adherents of any religion—new or old—could not seek to challenge federal land management decisions on the ground that their beliefs require the United States to maintain a particular piece of property in a particular manner. In view of the significant potential for disruption of Congress's plan for the management of federal lands that will result from the erroneous construction of the Free Exercise Clause adopted by the court below, review by this Court plainly is warranted.

4. Finally, we briefly address the procedural posture of this case. The district court's injunction against construction of the G-O road and implementation of the management plan—and the court of appeals' decision affirming the issuance of the injunction—rest upon three separate grounds: (1) the First Amendment determination presented for review here; (2) the finding that the environmental impact statements did not satisfy the requirement of the National Environmental Policy Act (NEPA); and (3) the conclusion that the project "as described in the EISs" would violate state water quality standards imposed under the Clean Water Act. It would have been appropriate for the courts below to withhold judgment on the constitutional question because the relief that they awarded—the prohibition of the two government actions at issue in this case—could have been based solely upon the statutory determinations. As this Court has observed, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality \* \* \* unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); see also *New York City Transit Authority v.*

*Beazer*, 440 U.S. 568, 582-583 & n.22 (1979); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Although the court of appeals decided the constitutional issue prematurely, its decision is binding and involves an issue of great importance to the government.<sup>17</sup> The fact that we have presented only the constitutional question in our petition—after determining that the statutory issues are not appropriate for review by this Court—does not mean that this Court's decision will be an advisory opinion lacking any substantive impact upon the parties to the litigation. This Court's decision on the issue presented for review is likely to determine whether the government will be able to go forward with these projects.

The portion of the district court's order based upon its First Amendment determination flatly bars the construction of the G-O road and implementation of the management plan. The portions of the district court's injunction relating to the NEPA and Clean Water Act issues, on the other hand, are conditional—they forbid action by the Forest Service only until it issues a revised EIS that satisfies the requirements of NEPA and demonstrates that the construction project will not violate the relevant water quality standards. App., *infra*, 90a-91a. The Forest Service informs us that if the unconditional portion of the injunction is lifted as a result of the reversal of the constitutional determination below, it anticipates that it will be able to comply with what we believe is required under the decisions below and proceed to construct the Chimney Rock section of the G-O road.<sup>18</sup>

<sup>17</sup> If the judgment below is not reviewed at this stage of the proceedings, the First Amendment determination will become final and definitively preclude the government actions at issue here.

<sup>18</sup> The Forest Service stands ready to reconsider the logging plan in light of the 1984 wilderness designation if the injunction prohibiting all logging in the area is invalidated as a result of this Court's decision. See note 12, *supra*.

The NEPA ruling simply requires the preparation of a more comprehensive environmental impact statement. With respect to the Clean Water Act claim, the court of appeals specified that its ruling was limited to the project "as described in the EISs" (App., *infra*, 19a). The Forest Service states that it believes that, through better descriptions of the pollution control features of the present project or the addition of new antipollution features to the project's design, it will be able to satisfy the state water quality standard. In this regard, funds for the construction of the road are available to the Forest Service in the current fiscal year. In sum, the Forest Service believes that reversal of the constitutional determinations below will make possible the completion of the G-O road because it will be able to make modifications that accommodate the provisions of the NEPA and the applicable state water quality standard.

Since this case properly presents an important constitutional question as to which the courts of appeals are in conflict, review by this Court is plainly warranted.<sup>19</sup>

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<sup>19</sup> If the Court believes that review is not appropriate because of the statutory grounds for the district court's injunction, it could simply vacate the lower courts' constitutional determinations. The lower courts would be free to reinstate those rulings after the government satisfies the relevant statutory requirements.

## CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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DECEMBER 1986

**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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CA No. 83-2225

DC No. 82-4049

DC No. 82-5943

**NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION,  
ET AL., PLAINTIFFS-APPELLEES,**

**v.**

**R. MAX PETERSON, CHIEF, U.S. FOREST SERVICE, ET AL.,  
DEFENDANTS-APPELLANTS.**

---

**STATE OF CALIFORNIA, PLAINTIFF-APPELLEE,**

**v.**

**JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF  
AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS.**

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**[Filed JUL 22, 1986]**

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**ORDER**

**BEFORE: DUNIWAY, CANBY AND BEEZER, CIR-  
CUIT JUDGES**

The government's petition for rehearing is granted. The case is submitted on the original briefs, the petition for rehearing and the response thereto. This court's previous opinion in this case, reported at 764 F.2d 581, is withdrawn, and the attached opinion is filed as the opinion of the court in this case. Judge Beezer's dissent is filed with it.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CA No. 83-2225

DC No. 82-4049

DC No. 82-5943

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION,  
ET AL., PLAINTIFFS-APPELLEES,

v.

R. MAX PETERSON, CHIEF, U.S. FOREST SERVICE, ET AL.,  
DEFENDANTS-APPELLANTS.

---

STATE OF CALIFORNIA, PLAINTIFF-APPELLEE,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF  
AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS.

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Appeal from the United States District Court  
for the Northern District of California

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The Honorable Stanley A. Weigel,  
District Judge, Presiding

Argued and Submitted July 9, 1984

Decided June 24, 1985

Decision Withdrawn and Rehearing Granted July 22, 1986

Decided July 22, 1986

[Filed JUL 22, 1986]

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OPINION

BEFORE: DUNIWAY, CANBY AND BEEZER, CIR-  
CUIT JUDGES

ON REHEARING

CANBY, Circuit Judge:

These consolidated actions contest the plans of the United States Forest Service ("Forest Service") to permit timber harvesting and to construct a road in the Blue Creek Unit of the Six Rivers National Forest in California. The Blue Creek Unit consists of 76,500 acres located in the Siskiyou Mountains. The Forest Service has inventoried approximately 31,500 of these acres as a roadless area.<sup>1</sup> On its northern boundary, the Blue Creek Unit adjoins the Eightmile and Siskiyou inventoried roadless areas. Blue Creek, the stream after which the Unit was named, flows into the Klamath River and contains important spawning habitat for several anadromous fish species. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 590 (N.D.Cal. 1983).

Contained within the Blue Creek Unit is an area known as the "high country," which is considered sacred by Yurok, Karok, and Tolowa Indians who live in the surrounding region. Although the Indians use specific sites within the "high country" for prayer and religious purposes, the sacred area encompasses the entire region, not just the individual sites. *Id.* at 591.

In 1972, the Forest Service began to prepare a multiple-use management plan and environmental impact statement (EIS) for the management of the Blue Creek and Eightmile

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<sup>1</sup> A "roadless area" is defined as "[a]n area of undeveloped Federal land within which there are not improved roads maintained for travel by means of motorized vehicles intended for highway use." FSM § 8260(B)(3)(a)(1).



Planning Units within the Six Rivers National Forest. In 1974 and 1975, the Forest Service circulated a draft, supplemental draft and final EIS which proposed various land use management plans for the Blue Creek Unit. In 1981, the "Blue Creek Unit Implementation Plan" (Management Plan) proposed to permit harvesting of 733 million board feet of Douglas fir from the Blue Creek Unit over an 80 year period.

In 1977, the Forest Service issued another draft EIS that proposed alternative routes to complete construction of the last 6.02 miles (Chimney Rock Section) of a paved road from Gasquet, California to Orleans, California (G-O Road). In 1982, the final EIS was issued for the proposed construction of the Chimney Rock Section through the Blue Creek Unit.

Plaintiffs objected to both proposed projects and, after exhausting administrative remedies, filed these actions in the district court. *Northwest Indian Cemetery Protection Association, et al. v. Peterson* was brought by the Northwest Indian Cemetery Protective Association (seven non-profit corporations and unincorporated associations), four individual plaintiffs of American Indian heritage, and two Sierra Club members. *State of California v. Block* was brought by the State of California acting through its Native American Heritage Commission. The complaints alleged that the Forest Service decisions to construct the Chimney Rock Section of road and to timber the Blue Creek Unit violated: (1) the first amendment of the United States Constitution; (2) the American Indian Freedom of Religion Act of 1978 (AIFRA), 42 U.S.C. § 1996; (3) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (4) the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.*; (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants' trust responsibility to

protect those rights; (6) the Administrative Procedure Act (APA), 5 U.S.C. § 706; (7) the Multi-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531; and (8) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

Prior to trial, the district court denied plaintiffs' motion for a preliminary injunction on the understanding that no road construction would begin prior to a ruling on the merits. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951 (N.D. Cal. 1982). After a full trial on the merits, the district court found that the challenged Forest Service decisions violated: (1) the first amendment; (2) NEPA and the Wilderness Act; (3) FWPCA; (4) Indian water and fishing rights on the Hoopa Valley Indian Reservation, and defendants' trust responsibility to protect those rights; and (5) the Administrative Procedure Act. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. at 591. The district court accordingly issued an injunction: (1) preventing construction of the G-O road and any timber harvesting or construction of logging roads in the high country; (2) preventing timber harvesting or construction of logging roads in the Blue Creek Roadless Area until an EIS was prepared evaluating its wilderness potential as part of adjoining roadless areas; and (3) enjoining timber harvesting and construction of logging roads anywhere in the Blue Creek Unit until an EIS was prepared specifying adequate measures to mitigate the impact of those activities on water quality and fish habitat in Blue Creek, and until studies were completed demonstrating that the proposed logging activities would not violate the FWPCA or reduce the supply of anadromous fish to the Hoopa Valley Indian Reservation. *Id.* at 606. The government appealed.

While the appeal was pending in this court, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984), which was signed by the President on September 28, 1984. The Act places in

wilderness, and out of the reach of logging, most but not all of the high country encompassed by that part of district court's injunction that is based on the first amendment. The Act left open a 1200 foot-wide corridor for completion of the G-O Road, but Congress appears to have intended not to take any position on whether the Road should be completed. See H.R. Rep. No. 98-40, 98th Cong., 1st Sess. 32; S.Rep. No. 98-582, 98th Cong., 2d Sess. 29; 130 Cong. Rec. No. 113, pp. 18-19 (H. Rep. Sept. 12, 1984) (Remarks of Cong. Seiberling).

### ISSUES

On this appeal we address the following issues raised by the Forest Service:<sup>2</sup>

(1) Whether the district court erred in enjoining road construction and timbering in the high country of the Blue Creek Unit on the ground that such activity would impermissibly burden the Indian plaintiffs' first amendment right to the free exercise of their religion;

(2) Whether the district court erred in holding that the EISs prepared for the road and land management plans failed adequately to discuss the effects on water quality of the proposed actions;

(3) Whether the district court erred in holding that Forest Service's proposed actions would violate the Federal Water Pollution Control Act and state water quality standards.

### DISCUSSION

#### I. First Amendment

The first amendment prohibits governmental actions that burden an individual's free exercise of religion unless those actions are necessary to fulfill a governmental in-

<sup>2</sup> In view of our disposition of this appeal, we do not find it necessary to address the issues raised by plaintiffs-appellees.

terest of the highest order that cannot be met in a less restrictive manner. See *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963). In this case the government challenges the district court's conclusion that certain proposed Forest Service management decisions, if implemented, would impermissibly burden the Indian plaintiffs' free exercise rights. Further, the government contends that even if its action would impose such a burden, it has demonstrated a governmental interest sufficient to override the Indians' religious interest.

#### A. Free Exercise Right

To establish a constitutionally valid free exercise claim, the Indian plaintiffs have the initial burden of demonstrating that governmental actions create a burden on their rights.<sup>3</sup> See *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963); *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir.) *cert. denied*, 464 U.S. 956 (1983). That the Indians use the Blue Creek high country area for religious purposes and consider the area sacred is not enough to characterize the contemplated Forest Service actions as a burden on free exercise rights. The Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs, and that the proposed governmental actions would seriously interfere with or impair those religious practices. *Wilson v. Block*, 708 F.2d at 742-44; *Sequoyah v. TVA*, 620 F.2d 1159,

<sup>3</sup> We review de novo the question whether the Indian plaintiffs have a valid first amendment claim. See *Fraser v. Bethel School District*, No. 403, 755 F.2d 1356, 1359 n.2 (9th Cir.), *cert. granted*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 56 (1985); *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, U.S. \_\_\_, 105 S.Ct. 101 (1984).

1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785, 792 (D.S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

The district court here found that

[f]or generations, individual members, spiritual leaders, and medicine persons of the Yurok, Karok, and Tolowa tribes have traveled to the high country to communicate with the "great creator," to perform rituals, and to prepare for specific religious and medicinal ceremonies. Such use of the high country is "central and indispensable" to the Indian plaintiffs' religion. . . .

Communication with the "great creator" is possible in the high country because of the pristine environment and opportunity for solitude found there. Construction of the Chimney Rock Section and/or the harvesting of timber in the high country, including "clear-cutting," would seriously damage the salient visual, aural, and environmental qualities of the high country. The Forest Service's own study concluded that "[intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices."<sup>4</sup>

We agree with the district court that the proposed operations would interfere with the Indian plaintiffs' free exercise rights.

<sup>4</sup> This finding distinguishes this case from *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), where tribal free exercise objections to development of the San Francisco Peaks in Arizona were rejected because the plaintiffs failed to show that the development would burden their religious beliefs or practices. *Id.* at 745.

There is a great deal of evidence in the record that the high country<sup>5</sup> is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the "power" that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use.<sup>6</sup> Finally, there is much evidence that the religious lives of many other Indians depends upon the services of those leaders who have received the necessary "power" in the high country. On all these points, there is virtually no evidence to the contrary.

The record also amply supports, indeed virtually compels, the conclusion that logging and the construction of logging roads would be utterly inconsistent with the Indians' religious practices. Because most of the high country has now been designated by Congress as a wilderness area, the issue of logging becomes less significant, although it does not disappear. The question of the completion of the G-O Road, however, retains its full vitality.

<sup>5</sup> We find no merit in the government's claim that the district court set the boundaries of the high country area to encompass an area greater than that established by plaintiffs at trial. Our review of the record reveals that the evidence fully supports the designation of boundaries in the district court's injunction.

<sup>6</sup> The dissent suggests that the report of Dr. Theodoratus, relied upon by the district court, took an impermissibly broad view of religion. The Theodoratus Report, however, did deal with matters discretely categorized as "religious," although it complained of the artificiality of such compartmentalization in the Indian context. *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* 44. The religious uses described by the Report unquestionably qualify as "religious" by the narrowest definition. In addition, the Theodoratus Report was not the only evidence of the religious uses of the high country; several witnesses testified to such use.



A substantial part of the evidence relied upon by the district court was the report prepared for the Forest Service by Dr. Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979) ("Theodoratus Report"). That Report was not at all equivocal about the Road:

[T]he completion of the G-O Road *via any of the proposed Chimney Rock alternatives (Routes 1-9)* will produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities. Such impact will be created through the degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities. It is recommended, therefore, that such an impact is, in fact, sufficient to justify the rejection of all proposed routes (Routes 1-9) of the Chimney Rock section of the G-O Road.

*Id.* at 422 (emphasis original). While much of the adverse impact would be indirect, from increased uses made possible by the Road, the geographic and design features of the Road itself supply part of the impact. *Id.* at 417. At least one witness testified that noise levels from the proposed Road would interfere with religious uses of the high country. We conclude that the Indian plaintiffs demonstrated that the Road would interfere with the free exercise of their religion.

The fact that the proposed government operations would virtually destroy the plaintiff Indians' ability to practice their religion differentiates this case from *Bowen v. Roy*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2147, 54 U.S.L.W. 4603 (1986). There the Court held that an Indian could not, on religious grounds, prevent the government from using a social security number that it had assigned to the Indian's child for purposes of providing governmental benefits. The Court states: "The Federal Government's use of a

Social Security number for Little Bird of the Snow does not itself in any degree impair [her father's] 'freedom to believe, express, and exercise' his religion." 54 U.S.L.W. at 4606. The Court also pointed out that the plaintiff was seeking to attack the government's conduct of its own internal operations, simply because they offended his religious sensibilities.<sup>7</sup> Here, however, the proposed road-building and logging operations would greatly impair religious exercises of the plaintiff Indians in the only place where they can be performed. In addition, logging and road-building on public lands, to which the public has access, is not the kind of internal governmental practice that the Court found beyond free exercise attack in *Roy*.

We also reject the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs or practices. Governmental action that makes exercise of first amendment rights more difficult or impedes religious observances may also be " 'invalid even though the burden may be characterized as being only indirect.' " *Sherbert v. Verner*, 374 U.S. at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961) (plurality opinion)); see *Scott v. Rosenberg*, 702 F.2d 1263, 1273-74 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984).

#### B. Establishment Clause

The government does not challenge the sincerity of the Indians' beliefs nor their religious character. It even concedes that the Indians' use of the high country for religious

<sup>7</sup> "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Roy*, \_\_\_ U.S. at \_\_\_, 54 U.S.L.W. at 4605.

purposes is entitled to some first amendment protection. *Northwest Indian Cemetery Protection Ass'n. v. Peterson*, 565 F. Supp. at 594. Indeed, the Forest Service plans to erect buffer zones to protect eleven sites with identified historical and ritual use. It argues that any greater protection of the area requires the government, in effect, to manage and maintain the area as a religious preserve for a single group in violation of the establishment clause.

The government substantially overstates its case and argues far beyond the reach of the district court's injunction. The district court's order permanently enjoins the Forest Service only from completing the G-O Road and from engaging in commercial timber harvesting and constructing logging roads in the high country. 565 F. Supp. at 606. The Forest Service remains free to administer the high country for all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat and wilderness. See Multiple-Use Sustained-Yield Act, 16 U.S.C. § 1604(e)(1). The Forest Service would not, by virtue of this injunction, sponsor or become entangled in religious matters in violation of the establishment clause. Nor is the Forest Service being required to police the conduct of visitors to prevent their interfering with Indian religious observances, a proposal rejected in *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

Moreover, managing the National Forest so as not to burden genuine Indian religious beliefs and practices is not an endorsement or advancement of that religion but evidences a policy of neutrality. See *Walz v. Tax Commission of New York City*, 397 U.S. 664, 669 (1970). The Constitution encourages accommodation, not merely tolerance, of all religions and forbids hostility toward any. See *Lynch v. Donnelly*, 465 U.S. 668 (1984). It is in this spirit that Congress passed the American Indian Religious

Freedom Act, 42 U.S.C. § 1996, which adopted the policy of protecting and preserving traditional Indian religious beliefs and practices, including access to sites.<sup>8</sup>

Once a violation of the free exercise clause has occurred, as here, an effective remedy must necessarily take the protected religious exercise into account. Such a remedy ought not be condemned as a violation of the establishment clause by too literally applying the "secular purpose" and "primary effect" tests of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Accommodating the free exercise of religion is a valid purpose of governmental action, and promotion of that liberty is a permissible primary effect. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); *Zorach v. Clausen*, 343 U.S. 306, 314 (1952). Therefore, "where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief." *Wilson v. Block*, 708 F.2d at 747.

### C. Compelling Government Interest

The district court ruled that the interests of the Forest Service in road construction and timber harvesting either would not be served by the proposed projects or "fall far short of constituting the 'paramount interests' necessary to justify infringement of plaintiffs' freedom of religion." 565 F. Supp. at 596. The government contends that the district court erred in not deferring to the judgment of the Secretary as to the proper purposes and management of the National Forest in light of the generality of congressional direction over the uses of the Forests.

<sup>8</sup> See also 16 U.S.C. § 228i(b) (lands in Grand Canyon National Park set aside for Havasupai Indians for purposes to include "religious purposes") Pub. L. 91-550, 84 Stat. 1437 (lands and Blue Lake in Carson National Forest set aside for Pueblo de Taos Indians for "traditional uses only, such as religious ceremonials").



The government's argument, and its entire approach to this issue, fails to take into account the free exercise standard that controls this case. The government makes little attempt to demonstrate that compelling governmental interests, on the facts of this case, require the completion of the paved G-O Road or the logging of the high country. Nor does the government reach the question whether those interests, if compelling, could be served in other ways that would interfere less with the Indians' religious rights. Instead, the government urges its prerogative to manage its forests in the usual way, within its statutory authority.<sup>9</sup>

This line of argument yields nothing to the free exercise clause. Admittedly, conventional free exercise analysis undergoes considerable strain when it is applied to site-specific religions centered on public lands. Yet the government does not take issue with those decisions that have adopted a balancing test. Those cases require the Indians first to show that the land in question is central and indispensable to the exercise of their religion and that the proposed governmental operations will interfere with that

<sup>9</sup> The government's argument finds some support, albeit in a different context, in the opinion of the Chief Justice, speaking for a plurality of three, in *Bowen v. Roy*, \_\_\_ U.S. at \_\_\_, 54 U.S.L.W. at 4607 ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.") Justice O'Connor, also speaking for a plurality of three, disagreed with that part of the Chief Justice's opinion. \_\_\_ U.S. at \_\_\_, 54 U.S.L.W. at 4613 ("Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.")

exercise; if that burden is met, then the government is required to show that its operations serve a compelling interest. See *Wilson v. Block*, 708 F.2d at 742-44; *Sequoyah v. TVA*, 620 F.2d at 1164; *Badoni v. Higginson*, 638 F.2d at 176-77; *Crow v. Gullet*, 541 F. Supp. at 792. In these cited cases, the Indian plaintiffs did not prevail. But inherent in the adoption of a balancing test is the distinct possibility that, on a different record, the Indians may prevail.

For example, in *Badoni*, the court found that Glen Canyon Dam, which created Lake Powell, served an overriding governmental interest. 638 F.2d at 177. In light of the magnitude of the project and the difficulty of placing it elsewhere, that ruling is not surprising. Nothing comparable has been shown by the government here to support its proposed projects. There was testimony that completion of the road and logging in the high country would increase employment in Del Norte County, but that this benefit would simply represent a shift of work from elsewhere in the state. There would be no statewide net gain in employment. There was evidence that forest management functions would be made easier by the road. There was evidence that the road would also provide greater recreation access to the area, but the projected use was not large. In our view, the government has fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights.

## II. Adequacy of the Environmental Impact Statements

### A. Standard of Review

The district court's review of an EIS is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(D); agency action may be set aside if it was undertaken without observance of procedures required by law. *Lathan*

v. *Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc). Courts are not to "fly speck" EISs, *id.*, but an EIS should not be upheld if it does not "reasonably [set] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (citations omitted).

We review the district court's conclusion to determine whether it is based upon an erroneous legal standard or upon clearly erroneous findings of fact. *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981).

#### B. Project Effects on Water Quality

The district court found that the Chimney Rock draft and final EISs were inadequate because: (1) they failed sufficiently to disclose the impact of the road construction on water quality; (2) they failed to discuss the cumulative impact of the road construction and implementation of the Management Plan on water quality; and (3) they failed adequately to describe what measures would be taken to mitigate adverse impacts on water quality. In addition, the district court found that the draft, supplemental draft, and final EISs prepared for the Blue Creek Management Plan inadequately described measures to mitigate adverse impacts on water quality in Blue Creek.

The government does not take issue with the legal standards applied to the EISs by the district court. Rather, it contends that the Chimney Rock draft and final EISs do address erosion and sedimentation problems relative to road construction. The government also argues that cumulative sedimentation effects on the water quality and fishlife are disclosed in the 1975 Blue Creek EIS for both the Chimney Rock Section and the proposed Management Plan and that it was unnecessary to readdress them in the Chimney Rock EISs. Further, it claims that the EISs identify specific mitigation measures.

#### 1. Impact of Road Construction on Water Quality

The draft and final EISs prepared for the Chimney Rock Section do address erosion and sedimentation effects of road construction on Blue Creek. The EISs state that total increased sedimentation would raise the sedimentation yield in Blue Creek by 5.5 percent, resulting in only a "small decrease" in water quality. The EISs do not, however, address increased sedimentation contributed by road-caused landslides, because of the difficulty inherent in predicting such slope failures. Thus, the potential risks to water quality stemming from the uncertainty in predicting landslides are ignored in the discussion of sedimentation effects. These risks must be revealed if they appear substantial. *See State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.) *vacated in part*, 439 U.S. 922 (1978).

The district court found that landslide risks were substantial and that debris from landslides triggered by the road construction would result in as much as a 500 percent increase in sediment loads in Blue Creek. These findings are not clearly erroneous. The failure to disclose such risks in the EIS renders them inadequate.

#### 2. Cumulative Sedimentation Effects on Water Quality

The district court was correct in finding that the Chimney Rock EISs do not address cumulative sedimentation effects on water quality rising from the proposed road and timber projects. Nor did the district court ignore the 1975 Blue Creek EIS, which the government contends does address cumulative effects.

The Blue Creek EIS does not adequately discuss cumulative effects because there the effects were judged as "average" increases in sediment over a period of years. State water quality standards, however, pertain to individual amounts of turbidity at a particular time and are

not written in terms of averages over years. The discussion of cumulative effects in the Blue Creek EIS is therefore inadequate and likely underestimates the actual cumulative effects of both projects on water quality.

The district court's finding that the EISs do not contain an adequate discussion of the cumulative effects of both projects on water quality is consequently not clearly erroneous.

### 3. Mitigation Measures

The applicable regulations require that an EIS discuss "[m]eans to mitigate adverse environmental impact" of the proposed action. 40 C.F.R. § 1502.16(h). The Chimney Rock and Blue Creek EISs discuss mitigation measures in part, but neither EIS analyzes the mitigation measures in detail or explains how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA. See *Adler v. Lewis*, 675 F.2d at 1096. The district court's conclusion that the EISs are inadequate for this reason is sound.

### III. Federal Water Pollution Control Act

The Federal Water Pollution Control Act requires each state to implement its own water quality standards with which federal agencies must comply. See 33 U.S.C. §§ 1313, 1323. The North Coast Regional Water Quality Control Board in California determines water quality standards for the Blue Creek area. See Water Quality Control Plan for Klamath River Basin 1A ("the Plan"). This Plan provides that "[t]urbidity shall not be increased more than 20 percent above naturally occurring background levels." *Id.* at 5-13. Further, it provides that "[t]he suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such

a manner as to cause nuisance or adversely affect beneficial uses." *Id.* The government challenges the district court's ruling that implementation of the Management Plan and construction of the Chimney Rock Section of the road would violate FWPCA because either activity would increase turbidity and suspended sediment levels above the 20 percent ceiling level established by the Plan.

The government first argues that the standards established in the Plan are no longer applicable to the Forest Service. It contends that these standards were superseded because California and the EPA accepted the Forest Service Best Management Practices (BMPs). The government claims that these BMPs are the applicable water quality standards for the Forest Service.

The BMPs, however, are merely a means to achieve the appropriate state Plan water quality standards. There is no indication in the Plan or in the agreements between the Forest Service and the Water Quality Control Board that the BMPs were to be considered standards in and of themselves. Adherence to the BMPs does not automatically ensure that the applicable state standards are being met. The district court found that the state standards would be violated if the Forest Service projects were implemented as described in the EISs. This finding is not clearly erroneous.<sup>10</sup>

<sup>10</sup> The district court found that the adverse impact of either project on water quality and fish habitat in Blue Creek would significantly decrease the quantity of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation. 565 F. Supp. at 605. The court held that the government's countenance of this adverse impact would constitute a breach of its trust responsibility toward those Indians.

Because the Hoopa Valley Tribe was not a party to this action, we do not find this case to be an appropriate vehicle in which to determine the range and extent of the trust responsibility owed to the Tribe. We therefore vacate that part of the district court's injunction that requires defendants to complete studies demonstrating that the



#### IV. Wilderness Evaluation

This appeal originally presented one issue in addition to those already discussed: whether the district court erred in holding that NEPA and the Wilderness Act required the Forest Service to evaluate the impact of the proposed actions on the wilderness potential of the Blue Creek Unit considered together with the Eightmile and Siskiyou Planning Units.

The parties are in agreement that this issue has been rendered moot by the enactment of the California Wilderness Act of 1984, P.L. 98-425. The Act places in wilderness about 19,000 acres of the Eightmile Creek Area and 26,000 acres of the Blue Creek Area.

Accordingly, we must vacate that portion of the district court's injunction that precludes timber harvesting or the construction of logging roads until the Forest Service prepares an EIS evaluating the wilderness potential of the Blue Creek Area together with the Eightmile and Siskiyou Roadless Areas.

#### V. Conclusion

We vacate those portions of the district court's order that enjoin defendants from harvesting timber or constructing logging roads until they have (1) prepared an EIS evaluating the wilderness potential of the Blue Creek Area together with the Eightmile and Siskiyou Roadless Areas;

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proposed logging activities would not reduce the supply of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation. In so doing, we note that the district court clearly viewed the deterioration of water quality in violation of FWPCA as the primary threat to the fish. The surviving portions of the district court's injunction preclude the defendants from logging until they complete and distribute studies demonstrating that such activities will not violate water quality standards of FWPCA.

and (2) completed studies demonstrating that the proposed logging activities would not reduce the supply of anadromous fish in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation.

In all other respects the decree of the district court is affirmed.<sup>11</sup>

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<sup>11</sup> Appellants' Motion to Supplement the Record on Appeal with material not presented to the district court either before or after the court rendered its opinion is DENIED.

No. 83-2225

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION

v.

PETERSON,

[Filed JUL 22, 1986]

BEEZER, Circuit Judge, dissenting in part:

I concur in Parts II, III, and IV of Judge Canby's majority opinion. I also concur in Part V to the extent that it is based on the discussion in Parts II, III, and IV. Because I conclude that the plaintiffs have not established a first amendment violation, I cannot concur in Part I. To the extent that the majority upholds the permanent injunction against timber harvesting and road construction in the "high country," I respectfully dissent.

## I

## Background

This action involves the proposed development of the Blue Creek Unit of Six Rivers National Forest. The Blue Creek Unit consists of 76,500 acres of mountainous land in the northwestern corner of California. The northeastern corner of the Blue Creek Unit, which is referred to as "the high country," is considered sacred by several Indian tribes. The district court described the Indian plaintiffs' use of the high country as follows:

Ceremonial use of the high country by the Yurok, Karok, and Tolowa tribes dates back to the early nineteenth century and probably much earlier.

Members of these tribes currently make regular use of the high country for several religious purposes. Individuals hike into the high country and use "prayer seats" located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal "power" through "engaging in emotional [and] spiritual exchange with the creator." Such exchange is made possible by the solitude, quietness, and pristine environment found in the high country. Certain key participants in tribal religious ceremonies such as the White Deerskin and Jump Dances must visit the high country prior to the ceremony to purify themselves and to make "preparatory medicine." The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community. Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines. They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances.

565 F.Supp. 586, 591-92 (N.D. Cal. 1983) (citations omitted).

In the early 1970s, the Forest Service began studying various land use management plans for the Blue Creek Unit. In 1981, the Forest Service issued the Blue Creek Unit Implementation Plan ("the Management Plan"), which proposed to authorize harvesting of 733 million board feet of timber over an eighty year period.

Since the 1960s, the Forest Service has been upgrading a seventy-five mile road between Gasquet, California and Orleans, California ("the G-O road"). Approximately six miles of the G-O road lies within the Blue Creek Unit. In

1982, the Forest Service issued an environmental impact statement for the proposed construction of the final six miles, which is referred to as the "Chimney Rock Section."

The plaintiffs brought this action to enjoin the Forest Service from beginning those projects. On May 24, 1983, the district court entered a permanent injunction against the Forest Service. The relevant portions of the injunction are as follows:

IT IS HEREBY ORDERED that defendants are permanently enjoined from constructing the Chimney Rock Section of the G-O road and/or any alternative route for that Section which would traverse the high country. . . .

IT IS FURTHER HEREBY ORDERED that defendants are permanently enjoined from engaging in commercial timber harvesting and/or from constructing any logging roads in the high country . . . pursuant to the 1981 Implementation Plan . . . or any other land management plan.

565 F.Supp. at 606.

## II

### Applicable Law

The Indian plaintiffs are attempting to use the free exercise clause to bar the development of public lands. Such attempts have raised difficult problems for first amendment theory. See Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods*, 10 Am. Ind. L. Rev. 59 (1982); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447 (1985) [hereinafter cited as Note, *Indian Religious Freedom*]. These problems have been resolved through the adoption of a two-step analysis. First, the plaintiffs must show that the area at issue is central and indispensable to their

religious practices and that the threatened activity would seriously interfere with or impair those practices. See *Wilson v. Block*, 708 F.2d 735, 742-44 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983). Second, if the plaintiffs meet their burden, the government must show an overriding government interest that cannot be served through less restrictive alternatives. See *id.* at 740; *Badoni v. Higginson*, 638 F.2d 172, 176-77 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).<sup>1</sup>

Four circuits have considered claims similar to those related by the Indian plaintiffs in this case. In all four cases, the claims were rejected. In *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), the Cherokee tribe sought to enjoin the construction of the Tellico Dam in Tennessee. The tribe asserted that the completion of the project would flood their "sacred homeland," destroying sacred sites, medicine gathering sites, holy places, and cemeteries and disturbing "the sacred balance of the land." *Id.* at 1160. The Sixth Circuit rejected the tribe's claims, holding that the tribe had failed to establish that their use of the lands was central to the

<sup>1</sup> This case presents a mixed question of law and fact. The district court's findings of historical fact are reviewed under the clearly erroneous standard. *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th Cir.) (en banc), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 101 (1984); see *Anderson v. City of Bessemer City*, 105 S.Ct. 1504 (1985); Fed. R. Civ. P. 52(a). The district court's selection of legal principles is reviewed do novo. *McConney*, 728 F.2d at 1200-01. In choosing a standard of review for the district court's application of law to facts, we refer "to the sound principles which underlie the settled rules of appellate review." *Id.* at 1202. If the inquiry is essentially factual, the clearly erroneous standard is applied. *Id.* If, on the other hand, we must "consider legal concepts in the mix of fact and law and . . . exercise judgment about the values that animate legal principles," de novo review is applied. *Id.* In this case, de novo review is appropriate. See *Fraser v. Bethel School District*, 755 F.2d 1356, 1359 n.2 (9th Cir. 1985), rev'd on other grounds, \_\_\_\_ U.S. \_\_\_\_ (1986).



practice of their religion. *Id.* at 1164-65. The court noted that it was "damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake." *Id.* at 1164.

The Tenth Circuit addressed a similar issue in *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). In *Badoni*, the tribe challenged the construction of the Glen Canyon Dam in Utah and the management of Rainbow Bridge National Monument by the National Park Service. The dam created Lake Powell, which the tribe claimed had drowned some of their gods and cut off tribal access to a sacred prayer spot and spring. *Id.* at 176. The lake also provided convenient access to the Monument, thus increasing the number of tourists. *Id.* at 175. The tribe asserted "that tourists visiting the Monument desecrate the area by noisy conduct, littering and defacement of the Bridge and that the presence of tourists prevents [the tribe] from holding ceremonies near the Bridge." *Id.* at 177. The Tenth Circuit rejected the tribes' claims. Initially, the court held that the flooding of the sacred areas was justified by an overriding government interest. *Id.* Emphasizing establishment clause concerns, the court also refused to order the Park Service to police the actions of tourists visiting the Monument. The court stated:

We find no basis in the law for ordering the government to exclude the public from public areas during the exercise of First Amendment rights.

. . . Although Congress has authorized the Park Service to regulate the conduct of tourists in order to promote and preserve the Monument, we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act "in a respectful and ap-

preciative manner." . . . Were it otherwise, the Monument would become a government-managed religious shrine.

*Id.* at 179 (citation omitted).

The Eighth Circuit addressed a similar claim in *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983), *aff'g* 541 F.Supp. 785 (D.S.D. 1982), *cert. denied*, 464 U.S. 977 (1983). In *Crow*, two tribes challenged South Dakota's management of a state park containing Bear Butte, an important religious site for the tribes. The tribes argued that (1) the development of the park had increased the number of tourists in the park, reducing the Butte's spiritual value and impairing religious ceremonies; (2) the development of the park had restricted tribal access to the Butte; (3) their religious practices were impermissibly burdened by registration and permit requirements that restricted entry into the park; and (4) the state had failed to control the tourists, who disrupted the tribe's religious practices. *Id.* at 858. Citing *Badoni*, and *Sequoyah* the district court rejected each argument. 541 F.Supp. at 791-93. The Eighth Circuit adopted the district court's opinion. 706 F.2d at 858-59.

The District of Columbia Circuit considered this issue in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). In *Wilson*, the Navajo and Hopi tribes sought to enjoin development of ski resorts in the San Francisco Peaks in Arizona. The tribes asserted that development of the Peaks "would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." *Id.* at 740. The tribe also asserted that development would impair their ability to pray, to conduct ceremonies, and to gather sacred objects such as fir boughs. *Id.* The District of Columbia Circuit rejected the tribe's claims. The court noted that the development of the Peaks would not cause the tribes to be denied access to any



sacred areas. *Id.* at 744. The court also concluded that development would not prevent the tribes from engaging in any religious practices. *Id.* at 744.

The district court was aware of the decisions in those circuits. Nevertheless, the district court found that the Forest Service had violated the first amendment. In doing so, the district court became the first federal court to enjoin the development of public lands on free exercise grounds.<sup>2</sup>

### III

#### The Construction of the G-O Road

The district court found that the construction of the G-O Road violated the free exercise clause because it "would seriously damage the salient visual, aural, and en-

<sup>2</sup> Because Indian religious concepts often differ substantially from Judeo-Christian concepts, some courts have been hesitant to recognize the first amendment rights of Indians in specific sites. See Note, *Indian Religious Freedom*, *supra*, at 1448-57. It is now well settled, however, that Indians have standing to raise first amendment objections to the development of public lands. *E.g.*, *Badoni*, 638 F.2d at 176. The district court properly concluded that the Indian plaintiffs have a first amendment interest in the high country.

It does not follow, however, that all of the Indian plaintiffs' uses of the high country are entitled to first amendment protection. To qualify for first amendment protection, the plaintiffs' use of the high country must be "religious." See Clark, *Guidelines for Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969). The Supreme Court has not adopted a clear definition of "religion." See Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 Texas L. Rev. 139, 141-52 (1982). It is apparent, however, that all forms of sociological activity are not entitled to protection under the free exercise clause. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

vironment qualities of the high country." 565 F.Supp. at 594-95. The district court did not make specific findings regarding the effects of the construction of the road. Instead, the district court relied exclusively on the conclusions of a study prepared by Dr. Dorothea Theodoratus at the request of the Forest Service. *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979) [hereinafter cited as *Theodoratus Report*]. The study concluded that "intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices." *Id.* at 420. Although the district court believed that the Theodoratus Report supported the issuance of an injunction, a careful review of the record reveals that the injunction was unsupported.

#### A. The Theodoratus Report

The Theodoratus Report did not conclude that the mere existence of the G-O Road would impair the Indian plaintiffs' religious practices.<sup>3</sup> Instead, the report focused on five side effects. On careful examination, it is apparent that the side effects did not justify the issuance of an injunction against the construction of the road.

<sup>3</sup> It is apparent that Dr. Theodoratus applied an inappropriate definition of "religion." The report states:

Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into "religious" or "sacred" is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process.

*Theodoratus Report* at 44. The report then suggests that hunting and fishing are religious activities for Indians. *Id.* While that may be correct in an anthropological sense, the federal Constitution does not recognize such a broad concept of "religion." See *supra* note 2.

### 1. Road Building Activities Off the Right-of-Way

The Theodoratus Report concluded that the construction of the G-O Road threatened damage to archeological sites located off the right-of-way. *Id.* at 368-69. The report did not suggest that the destruction of any or all of those sites would impair the practice of the Indian plaintiffs' religion. See *Sequoyah*, 620 F.2d at 1164-65. Most of the sites appear to be exclusively of archeological, rather than religious, significance. See, e.g., *Theodoratus Report* at 358 (noting that "GO-24," one of the sites that could be affected, had not been used for rituals since before 1900). Moreover, the Theodoratus Report was prepared prior to the selection of the present proposed route. One of the reasons for the selection of that route was that there would be "no ground disturbing activities on any significant archaeological properties." Forest Service, *Cultural Resources Preliminary Case Report Supplement* 31 (1981) [hereinafter cited as *Case Report*].

In any event, the Theodoratus Report assumes that the archeological sites would be damaged by negligent construction techniques or vandalism by construction workers. At most, such a threat of damage would justify an order requiring the Forest Service to safeguard against those dangers. The Theodoratus Report did not suggest that damage to the archeological sites could not be prevented by appropriate precautions.

### 2. Logging

The Theodoratus Report correctly concluded that completion of the G-O Road would open up areas for commercial logging. *Theodoratus Report* at 369-70. To the extent that logging activities threatened the Indian plaintiffs' religious practices, however, the appropriate remedy was an injunction against logging. In fact, the district court

entered such an injunction.<sup>4</sup> If the injunction against logging is upheld, the injunction against construction of the G-O Road is obviously not necessary to prevent logging. If the injunction against logging is overturned, on the other hand, surely an injunction aimed at stopping logging indirectly cannot be upheld on that ground. Accordingly, logging activities are irrelevant to the present analysis.

### 3. Mining

The Theodoratus Report also concluded that the completion of the G-O Road would encourage mining activities in the high country. *Id.* at 370-71. The appropriate remedy, once again, was an injunction against mining. The injunction against the completion of the G-O Road cannot be upheld on this ground.

### 4. Forest Service Activities

The Theodoratus Report concluded that the completion of the G-O Road would increase the volume of Forest Service activities in the high country. *Id.* at 371. The report also concluded, however, that "these activities are unlikely to have a serious effect on archaeological resources." *Id.*

### 5. Recreational Activities

The Theodoratus Report concluded that completion of the G-O Road would increase the number of recreational visitors to the high country. *Id.* at 371-72. In essence, the report concludes that campers and hikers would invade the Indian plaintiffs' seclusion and violate the pristine nature of the area. In light of *Badoni* and *Crow*, this threat is not

<sup>4</sup> The injunction against logging is discussed in Part IV, *infra*.

of constitutional magnitude. The Indian plaintiffs are not entitled to exclusive use of the high country.<sup>5</sup>

#### 6. Summary

The Theodoratus Report's conclusion that completion of the G-O Road threatened the Indian plaintiffs' free exercise rights was plausible. The district court erred, however, by assuming that the report's conclusion supported the issuance of an injunction. Three of the five potential adverse effects cited in the report—logging, mining, and recreational use—cannot support issuance of an injunction against road construction. The remaining two potential adverse effects—road construction activities off the right-of-way and Forest Service activities—do not pose a serious threat to the practice of the Indian plaintiffs' religion. Accordingly, the district court's reliance on the Theodoratus Report was misplaced.

#### B. Other Effects

In addition to the potential effects discussed in the Theodoratus Report, the Indian plaintiffs claim that the completion of the G-O Road would cause two additional

<sup>5</sup> In addition, the Forest Service proposed various measures to control visitor usage of the high country. These measures were as follows:

1. Traffic will be deterred from stopping by providing no turn-outs or parking areas.
2. There will be no signing to draw attention to the ideological-spiritual or archeological sites.
3. The selection of [the route] physically restricts traffic to the proposed travel-way as most of the route is situated on side slopes.
4. The Forest Off-Road Vehicle (ORV) Plan prohibits off-road vehicle use in the area. Vehicles leaving the roadway would be in violation.
5. Interpretive information provided to the public will not draw attention to the cultural values of the area.

*Case Report at 35-36.*

adverse effects. First, the Indian plaintiffs claim that visibility of the road from religious sites would impair their religious practices. The district court did not make findings regarding this claim. Nevertheless, it is apparent that the claim lacks merit. It is virtually inconceivable that the visibility of the G-O Road could seriously impair the practice of the Indian plaintiffs' religion. Moreover, the Forest Service proposed ten measures to mitigate the visual impact of the road:

1. The clearing limits from the top of the cuts to the bottom of fills will be kept to an absolute minimum.
2. The road would be constructed at the minimum practical width for two lanes; 24 feet travel-way on a 32 feet construction width.
3. Earthwork will be kept to a minimum by varying the grade and alignment of the road to fit the natural terrain.
4. Vegetation will be planted in cut and fills.
5. In areas of flat terrain (20% or less), clearing edges will be feathered to reduce contrasts and to give a natural appearance for vegetation alongside the road.
6. There will be no retaining walls.
7. Blue Creek will be crossed by an inconspicuous structural-plate metal arch bridge.
8. The asphalted road surface will have a black color which will blend in color with the surroundings.
9. Paving will eliminate dust-clouds associated with vehicle traffic.
10. Signing will be kept to the minimum needed for safety.

#### *Case Report at 35.*

Second, the Indian plaintiffs asserted that "increased aural disturbances from construction and use of the road



would . . . impair the success of religious and medicinal quests into the high country." 565 F.Supp. at 592. In *Wilson*, the District of Columbia Circuit rejected a similar argument. 708 F.2d at 744-45. Like the plaintiffs in *Wilson*, the Indian plaintiffs in this case have failed to prove that the completion of the road would prevent them from practicing their religion. While it is possible that noise from the road would impair religious and medicinal quests in the area adjoining the road, it is apparent that the high country is a large area. The Indian plaintiffs have not established that their quests can take place only in the area near the road.

#### C. Conclusion

The district court found that the completion of the G-O Road would seriously impair the practice of the Indian plaintiffs' religion. The record does not support that finding. Accordingly, I would reverse the order granting a permanent injunction against completion of the G-O Road.

### IV

#### The Management Plan

##### A. The California Wilderness Act of 1984

On September 28, 1984, President Reagan signed the California Wilderness Act, Pub L. No. 98-425, 98 Stat. 1619 (1984). The Act designated much of Six Rivers National Forest as wilderness areas. *Id.* § 101(a)(19), (30), (34), (36), 98 Stat. 1621-24 (codified at 16 U.S.C. § 1132 note). Of the land covered by the first amendment injunction, only small parcels are not included in the wilderness area. One such parcel is a narrow strip of land set aside so that the completion of the G-O Road would not be precluded.

16 U.S.C. § 1133(c) prohibits commercial activities in wilderness areas. The first amendment issues raised by the proposed development of the newly designated wilderness areas are therefore moot. I would vacate the order granting the injunction against development to the extent that it covers those areas. It is not clear whether the district court would have issued an injunction based upon the development of the remaining small parcels. Accordingly, I would remand to allow the district court to reevaluate its injunction in light of the Act.

##### B. First Amendment Issues Upon Remand

Upon remand to reconsider its injunction against timber harvesting in the high country, I would ask the district court to reevaluate both the threat of limited development to the Indians' right to free exercise of religion, and the strength of the government's interest in developing the high country.

In light of the Wilderness Act, a serious question is raised as to whether timber harvesting on those few small parcels of land still available for development could pose any serious threat to the Indian plaintiffs' religious practices involving the larger territory. It may now be more feasible to accommodate the religious concerns of the Indians without foreclosing the limited logging activities that would still be possible in the wake of the wilderness designation.

Even if the district court were to conclude upon remand that any development would infringe the Indians' exercise of religion, I would instruct the court also to reexamine whether the government can demonstrate a compelling interest in developing those areas. I am not convinced that the district court has thus far given proper respect to the government's ownership rights in public lands.



In entering its order enjoining timber harvesting in the high country, the district court offered the following analysis regarding the government's interest:

Harvesting of timber from the Blue Creek Unit pursuant to the Management Plan would not serve any compelling *public* interest. That timber is a small fraction of the timber resources found in the entire Six Rivers National Forest. Its harvesting would not significantly affect timber supplies. Moreover, the regional timber industry will not suffer greatly without access to timber in the Unit.

565 F.Supp. at 596 (emphasis added).

The issue is not whether the public has a compelling interest, but whether the government has a compelling interest. The government's interest in putting public lands to productive use must be weighed carefully in the balance. While the government has many obligations that are not shared by private landowners, the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits.

Although it may be appropriate in some limited circumstances to order the preservation of discrete parcels of land to accommodate Indian religious exercises, the courts should guard against the creation of private religious preserves covering vast expanses of our public lands. To do otherwise is to risk violation by judicial order of the establishment clause.

These interests and concerns cannot properly be evaluated upon the present record before this court. We should await reconsideration by the district court of these matters in light of the changed circumstances created by the California Wilderness Act. Accordingly, the district court's injunction against timber harvesting cannot be upheld.

v

### Conclusion

The district court's order was the first decision restricting the government's ability to develop public lands on the basis of the free exercise clause. I would follow the Sixth, Eighth, Tenth, and District of Columbia Circuits and overturn the order granting injunctive relief to the extent that it rests on the first amendment.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CA No. 83-2225

DC No. 82-4049

DC No. 82-5943

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION,  
ET AL., PLAINTIFFS-APPELLEES,

v.

R. MAX PETERSON, CHIEF, U.S. FOREST SERVICE, ET AL.,  
DEFENDANTS-APPELLANTS.

STATE OF CALIFORNIA, PLAINTIFF-APPELLEE,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF  
AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS.Appeal from the United States District Court  
for the Northern District of CaliforniaStanley A. Weigel, District Judge, Presiding  
Argued and Submitted July 9, 1984—  
San Francisco, California

[Filed JUN 24, 1985]

## OPINION

BEFORE: DUNIWAY, CANBY AND BEEZER, CIR-  
CUIT JUDGES.

CANBY, CIRCUIT JUDGE:

These consolidated actions contest the plans of the United States Forest Service (Forest Service) to permit timber harvesting and to construct a road in the Blue Creek Unit of the Six Rivers National Forest in California. The Blue Creek Unit consists of 76,500 acres located in the Siskiyou Mountains. The Forest Service has inventoried approximately 31,500 of these acres as a roadless area.<sup>1</sup> On its northern boundary, the Blue Creek Unit adjoins the Eightmile and Siskiyou inventoried roadless areas. Blue Creek, the stream after which the Unit was named, flows into the Klamath River and contains important spawning habitat for several anadromous fish species. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 590 (N.D. Cal. 1983).

Contained within the Blue Creek Unit is a segment of land known as the "high country," which is considered sacred by Yurok, Karok, and Tolowa Indians who live in the surrounding region. Although the Indians use specific sites within the Blue Creek Unit for prayer and religious uses, the sacred area encompasses an entire region. *Id.* at 591.

In 1972, the Forest Service began to prepare a multiple-use management plan and environmental impact statement (EIS) for the management of the Blue Creek and Eightmile Planning Units within the Six Rivers National Forest. In 1974 and 1975, the Forest Service circulated a draft, supplemental draft and final EIS which proposed

<sup>1</sup> A "roadless area" is defined as "[a]n area of undeveloped Federal land within which there are not improved roads maintained for travel by means of motorized vehicles intended for highway use." FSM § 8260(B)(3)(a)(1).

various land use management plans for the Blue Creek Unit. In 1981, the "Blue Creek Unit Implementation Plan" (Management Plan) proposed to permit harvesting of 733 million board feet of Douglas fir from the Blue Creek Unit over an 80 year period.

In 1977, the Forest Service issued another draft EIS that proposed various alternative routes to complete construction of the last 6.02 miles (Chimney Rock Section) of a paved road from Gasquet, California to Orleans, California (G-O Road). In 1982, the final EIS was issued for the proposed construction of the Chimney Rock Section through the Blue Creek Unit.

Plaintiffs objected to both proposed projects and, after exhausting administrative remedies, filed these actions in the district court. *Northwest Indian Cemetery Protective Associations, et al. v. Peterson* was brought by the Northwest Indian Cemetery Protective Association (seven non-profit corporations and unincorporated associations), four individual plaintiffs of American Indian heritage, and two Sierra Club members. *State of California v. Block* was brought by the State of California acting through its Native American Heritage Commission. The complaints alleged that the Forest Service decisions to construct the Chimney Rock Section of road and to timber the Blue Creek Unit violated: (1) the first amendment of the United States Constitution; (2) the American Indian Freedom of Religion Act of 1978 (AIFRA), 42 U.S.C. § 1996; (3) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4231 *et seq.*, and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (4) the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.*; (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants' trust responsibility to protect those rights; (6) the Administrative Procedure Act (APA), 5 U.S.C. § 706; (7) the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531; and (8) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

Prior to trial, the district court denied plaintiffs' motion for a preliminary injunction on the understanding that no road construction would begin prior to a ruling on the merits. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951 (N.D. Cal. 1982). After a full trial on the merits, the district court found that the challenged Forest Service decisions violated: (1) the first amendment; (2) NEPA and the Wilderness Act; (3) FWPCA; (4) Indian water and fishing rights on the Hoopa Valley Indian Reservation, and defendants' trust responsibility to protect those rights; and (5) the Administrative Procedure Act. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 591 (N.D. Cal. 1983). The district court accordingly issued an injunction: (1) preventing construction of the G-O road and any timber harvesting or construction of logging roads in the high country; (2) preventing timber harvesting or construction of logging roads in the Blue Creek Roadless Area until an EIS was prepared evaluating its wilderness potential as part of adjoining roadless areas; and (3) enjoining timber harvesting and construction of logging roads anywhere in the Blue Creek Unit until an EIS was prepared specifying adequate measures to mitigate the impact of those activities on water quality and fish habitat in Blue Creek, and until studies were completed demonstrating that the proposed logging activities would not violate the FWPCA or reduce the supply of anadromous fish to the Hoopa Valley Indian Reservation. The government appeals.

#### ISSUES

On this appeal we address the following issues raised by the Forest Service.<sup>2</sup>

- (1) Whether the district court erred in enjoining road construction and timbering in the high country

<sup>2</sup> In view of our disposition of this appeal, we do not find it necessary to address the issues raised by plaintiffs-appellees.



of the Blue Creek Unit on the grounds that such activity would impermissibly burden the Indian plaintiffs' first amendment right to the free exercise of their religion;

(2) Whether the district court erred in holding that the EISs prepared for the road and land management plans failed adequately to discuss the effects on water quality of the proposed actions;

(3) Whether the district court erred in holding that the Forest Service's proposed actions would violate the Federal Water Pollution Control Act and state water quality standards.

### DISCUSSION

#### I. First Amendment

The first amendment prohibits governmental actions that burden an individual's free exercise of religion unless those actions are necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner. See *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963). In this case the government challenges the district court's conclusion that certain proposed Forest Service management decisions, if implemented, would impermissibly burden the Indian plaintiffs' free exercise rights. Further, the government contends that even if its actions would impose such a burden, it has demonstrated a compelling governmental interest, not capable of being met in a less restrictive manner, sufficient to override the Indians' religious interests.

#### A. Free Exercise Rights

To establish a constitutionally valid free exercise claim, Indian plaintiffs have the initial burden of proof to demonstrate that governmental actions create a burden on

their rights. See *School District of Abington Township*, 374 U.S. 203, 223 (1963); *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir.), cert. denied, 104 S.Ct. 371 (1983). That the Indians use the Blue Creek high country area for religious purposes and consider the area sacred is not enough to characterize the contemplated Forest Service actions as a burden on free exercise rights. The Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs and that the proposed governmental actions would seriously interfere with or impair those religious practices. *Id.* at 742-44; *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785, 792 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), cert. denied, 104 S. Ct. 413 (1983).

The district court here found that

[f]or generations, individual members, spiritual leaders, and medicine persons of the Yurok, Karok, and Tolowa tribes have traveled to the high country to communicate with the "great creator," to perform rituals, and to prepare for specific religious and medicinal ceremonies. Such use of the high country is "central and indispensable" to the Indian plaintiffs' religion. . . .

Communication with the "great creator" is possible in the high country because of the pristine environment and opportunity for solitude found there. Construction of the Chimney Rock Section and/or the harvesting of timber in the high country, including "clear-cutting," would seriously damage the salient visual, aural, and environmental qualities of the high country. The Forest Service's own study concluded that "[i]ntrusions on the sanctity of the Blue Creek

high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices."<sup>3</sup>

565 F. Supp. at 594-95 (citations omitted). This finding is sufficient to support the district court's conclusion that the proposed operations would interfere with the Indian plaintiffs' free exercise rights. The government disputes the finding, but our review of the record convinces us that it is not clearly erroneous.

We also reject the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs or practices. Governmental action that makes exercise of first amendment rights more difficult or impedes religious observances may also be "invalid even though the burden may be characterized as being only indirect." *Sherbert v. Verner*, 374 U.S. at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion)).

#### B. Establishment clause

The government does not challenge the sincerity of the Indians' beliefs nor their religious character. It even concedes that the Indians' use of the high country for religious purposes is entitled to some first amendment protection. *Northwest Indian Cemetery Protection Ass'n v. Peterson*, 565 F. Supp. at 594. Indeed, the Forest Service plans to erect buffer zones to protect eleven sites with identified historical and ritual use. It argues that any greater protection of the area requires the government, in effect, to manage and maintain the area as a religious preserve for a single group in a violation of the establishment clause.

<sup>3</sup> This finding distinguishes this case from *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), where tribal free exercise objections to development of the San Francisco Peaks in Arizona were rejected because the plaintiffs failed to show that the development would burden them in their religious beliefs or practices. *Id.* at 745.

The government substantially overstates its case and argues far beyond the reach of the district court's injunction. The district court's order permanently enjoins the Forest Service only from engaging in commercial timber harvesting and from constructing any logging roads in the high country pursuant to any land management plan. 565 F. Supp. at 606. The Forest Service remains free to administer the high country for all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat, and wilderness. See Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528; National Forest Management Act, 16 U.S.C. § 1604(e)(1). The Forest Service would not, by virtue of this injunction, sponsor or become entangled in religious matters in violation of the establishment clause.

Moreover, managing the National Forest so as not to burden genuine Indian religious beliefs and practices is not an endorsement or advancement of that religion but evidences a policy of neutrality. See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). The Constitution encourages accommodation, not merely tolerance, of all religions and forbids hostility toward any. See *Lynch v. Donnelly*, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1355, 1359 (1984). "[W]here governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief." *Wilson v. Block*, 708 F.2d at 747.

#### C. Compelling Government Interest

The district court ruled that the interests of the Forest Service in road construction and timber harvesting either would not be served by the proposed projects or "fall far short of constituting the 'paramount interests' necessary to justify infringement of plaintiffs' freedom of religion." 565 F. Supp. at 596. The government contends that the district court erred in not deferring to the judgment of the Secretary as to the proper purposes and management of

the National Forest in light of the generality of congressional direction over the uses of the Forests. The issue before us, however, is not whether the Secretary violated statutory directives, but whether the Secretary violated the first amendment. The district court's findings of fact with regard to the absence of a compelling governmental interest are not clearly erroneous.<sup>4</sup>

## II. Adequacy of the Environmental Impact Statements

### A. Standard of Review

The district court's review of an EIS is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(D); agency action may be set aside if it was undertaken without observance of procedures required by law. *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc). Courts are not to "fly speck" EISs, *id.*, but an EIS should not be upheld if it does not "reasonably [set] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (citations omitted).

We review the district court's conclusion to determine whether it is based upon an erroneous legal standard or upon clearly erroneous findings of fact. *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981).

### B. Project Effects on Water Quality

The district court found that the Chimney Rock draft and final EISs were inadequate because: (1) they failed sufficiently to disclose the impact of the road construction

<sup>4</sup> We find no merit in the government's claim that the district court set the boundaries of the high country area to encompass an area greater than that established by plaintiffs at trial. Our review of the record reveals that the evidence fully supports the designation of boundaries in the district court's injunction.

on water quality; (2) they failed to discuss the cumulative impact of the road construction and implementation of the Management Plan on water quality; and (3) they failed adequately to describe what measures would be taken to mitigate adverse impacts on water quality. In addition, the district court found that the draft, supplemental draft, and final EISs prepared for the Blue Creek Management Plan inadequately described measures to mitigate adverse impacts on water quality in Blue Creek.

The government does not take issue with the legal standards applied to the EISs by the district court. Rather, it contends that the Chimney Rock draft and final EISs do address erosion and sedimentation problems relative to road construction. It also argues that cumulative sedimentation effects on water quality and fishlife are disclosed in the 1975 Blue Creek EIS for both the Chimney Rock Section and the proposed Management Plan and that it was unnecessary to readdress them in the Chimney Rock EISs. Further, it claims that the EISs do identify specific mitigation measures.

### 1. Impact of Road Construction on Water Quality

The draft and final EISs prepared for the Chimney Rock Section do address erosion and sedimentation effects of road construction on Blue Creek. The EISs state that total increased sedimentation would raise the sedimentation yield in Blue Creek by 5.5 percent, resulting in only a "small decrease" in water quality. The EISs do not, however, address increased sedimentation contributed by road-caused landslides, because of the difficulty inherent in predicting such slope failures. Thus, the potential risks to water quality stemming from the uncertainty in predicting landslides are ignored in the discussion of sedimentation effects. These risks must be revealed if they appear substantial. See *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated in part*, 439 U.S. 922 (1978).



The district court found that landslide risks were substantial and that debris from landslides triggered by the road construction would result in as much as a 500% increase in sediment loads in Blue Creek. These findings are not clearly erroneous. The failure to disclose such risks in the EISs renders them inadequate.

## 2. Cumulative Sedimentation Effects on Water Quality

The district court was correct in finding that the Chimney Rock EISs do not address cumulative sedimentation effects on water quality arising from the proposed road and timber projects. Nor did the district court ignore the 1975 Blue Creek EIS, which the government contends does address cumulative effects.

The Blue Creek EIS does not adequately discuss cumulative effects because there the effects were judged as "average" increases in sediment over a period of years. State water quality standards, however, pertain to individual amounts of turbidity at a particular time and are not written in terms of averages over years. The discussion of cumulative effects in the Blue Creek EIS is therefore inadequate and likely underestimates the actual cumulative effects of both projects on water quality.

The district court's finding that the EISs do not contain an adequate discussion of the cumulative effects of both projects on water quality is consequently not clearly erroneous.

## 3. Mitigation Measures

The applicable regulations require that an EIS discuss "[m]eans to mitigate adverse environmental impacts" of the proposed action. 40 C.F.R. § 1502.16(h). The Chimney Rock and Blue Creek EISs discuss mitigation measures in part, but neither EIS analyzes the mitigation measures in detail or explains how effective the measures

would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA. *See Adler v. Lewis*, 675 F.2d at 1096. The district court's conclusion that the EISs are inadequate for this reason is sound.

## III. FWPCA

The Federal Water Pollution Control Act requires each state to implement its own water quality standards with which federal agencies must comply. *See* 33 U.S.C. §§ 1313, 1323. The North Coast Regional Water Quality Control Board in California determines water quality standards for the Blue Creek area. *See* Water Quality Control Plan for Klamath River Basin 1-A (208 Plan). This 208 Plan provides that "[t]urbidity shall not be increased more than 20 percent above naturally occurring background levels." *Id.* at 5-13. Further, it provides that "[t]he suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses." *Id.* The government challenges the district court's ruling that implementation of the Management Plan and construction of the Chimney Rock Section would violate FWPCA because either activity would increase turbidity and suspended sediment levels above the 20 percent ceiling level established by the 208 Plan.

The government first argues that the standards established in the 208 Plan are no longer applicable to the Forest Service. It contends that these standards were superseded by California's and EPA's acceptance of Forest Service Best Management Practices (BMPs). The government claims that these BMPs are the applicable water quality standards for the Forest Service.

The BMPs, however, are merely a means to achieve the appropriate state 208 Plan water quality standards. There is no indication in the 208 Plan or in the agreements be-

tween the Forest Service and the Water Quality Control Board that the BMPs were to be considered standards in and of themselves. Adherence to the BMPs does not automatically assure compliance. In fact, the federal statute contemplates that any activity conduct pursuant to a BMP can be terminated or modified if a change in that activity requires a stricter BMP. See 33 U.S.C. § 1288(b)(4)(B)(iv)(II). Of course, a stricter BMP would be required if, as here, the conducted activity resulted in a violation of state water quality standards.

The government's second argument is that even if the state 208 Plan standards are applicable, FWPCA requires only that state plans include "procedures and methods \* \* \* to control [silviculturally related nonpoint source pollution] to the extent feasible." See 33 U.S.C. § 1288(b)(2)(F)(ii). It claims that the BMPs ensure that the contemplated activities will be conducted in a manner which will prevent pollution to the extent feasible. It argues that so long as the BMPs are utilized, there is no violation of the state water quality standards.

This argument is a but a variation of the one before, and fails for the same reasons. Adherence to the BMPs does not automatically ensure that the applicable state standards are being met. The district court found that the state standards would be violated if the Forest Service projects were implemented as described in the EISs. This finding is not clearly erroneous.<sup>5</sup>

<sup>5</sup> The district court found that the adverse impact of either project on water quality and fish habitat in Blue Creek would significantly decrease the quantity of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation. 565 F. Supp. at 605. The court held that the government's countenance of this adverse impact would constitute a breach of its trust responsibility toward those Indians.

Because the Hoopa Valley Tribe was not a party to this action, we do not find this case to be an appropriate vehicle in which to determine the range and extent of the trust responsibility owed to the

#### IV. Wilderness Evaluation

This appeal originally presented one issue in addition to those already discussed: whether the district court erred in holding that NEPA and the Wilderness Act required the Forest Service to evaluate the impact of proposed actions on the wilderness potential of the Blue Creek Unit considered together with the Eightmile and Siskiyou Planning Units.

The parties are in agreement that this issue has been rendered moot by the enactment of the California Wilderness Act of 1984, P.L. 98-425, which was signed by the President on September 28, 1984. The Act places in wilderness about 19,000 acres of the Eightmile Creek Area and 26,000 acres of the Blue Creek Area.

Accordingly, we must vacate that portion of the district court's injunction that precludes timber harvesting or the construction of logging roads until the Forest Service prepares an EIS evaluating the wilderness potential of the Blue Creek Area together with the Eightmile and Siskiyou Roadless Areas.

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Tribe. We therefore vacate that part of the district court's injunction that requires defendants to complete studies demonstrating that the proposed logging activities would not reduce the supply of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation. In so doing, we note that the district court clearly viewed the deterioration of water quality in violation of FWPCA as the primary threat to the fish. The surviving portions of the district court's injunction preclude the defendants from logging until they complete and distribute studies demonstrating that such activities will not violate water quality standards of FWPCA.

### V. Conclusion

We vacate those portions of the district court's order that enjoin defendants from harvesting timber or constructing logging roads until they have (1) prepared an EIS evaluating the wilderness potential of the Blue Creek Area together with the Eightmile and Siskiyou Roadless Areas; and (2) completed studies demonstrating the proposed logging activities would not reduce the supply of anadromous fish in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation.

In all other respects the decree of the district court is affirmed.<sup>6</sup>

AFFIRMED IN PART AND VACATED IN PART.

<sup>6</sup> Appellants' Motion to Supplement the Record on Appeal with material not presented to the district court either before or after the court rendered its opinion is DENIED.

### APPENDIX C

#### UNITED STATES DISTRICT COURT NORTHERN DISTRICT CALIFORNIA

Nos. C-82-4049 SAW, C-82-5943 SAW.

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, A NON-PROFIT CORPORATION; JIMMIE JAMES; SAM JONES; LOWANA BRANTNER; CHRISTOPHER H. PETERS; SIERRA CLUB, A NON-PROFIT CORPORATION; THE WILDERNESS SOCIETY, A NON-PROFIT CORPORATION; CALIFORNIA TROUT, A NON-PROFIT CORPORATION; SISKIYOU MOUNTAINS RESOURCE COUNCIL, AN UNINCORPORATED ASSOCIATION; REDWOOD REGION AUDUBON SOCIETY, AN UNINCORPORATED ASSOCIATION; NORTHCOAST ENVIRONMENTAL CENTER, A NON-PROFIT CORPORATION; TIMOTHY MCKAY; AND JOHN AMODIO; PLAINTIFFS,

v.

R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF, UNITED STATES FOREST SERVICE; JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; AND UNITED STATES OF AMERICA; DEFENDANTS.

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE NATIVE AMERICAN HERITAGE COMMISSION, PLAINTIFF,

v.

JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; ZANE G. SMITH, JR., IN HIS OFFICIAL CAPACITY AS REGIONAL FORESTER OF THE CALIFORNIA REGION OF THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANTS.

May 24, 1983



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

WEIGEL, District Judge.

These two suits, consolidated for trial, challenged decisions by the United States Forest Service (Forest Service) (1) to complete construction of the last 6.02 miles (Chimney Rock Section) of a paved road from Gasquet, California, to Orleans, California (the "G-O road"), and (2) to adopt a forest management plan providing for the harvesting of timber for the Blue Creek Unit of Six Rivers National Forest.

Plaintiffs in *Northwest Indian Cemetery Protective Association, et al.*, C-82-4049 SAW, are seven non-profit corporations and unincorporated associations (Northwest Indian Cemetery Protective Association, Sierra Club, The Wilderness Society, California Trout, Siskiyou Mountains Resource Council, Redwood Region Audubon Society, and Northcoast Environmental Center), four individual plaintiffs of American Indian heritage (Jimmie James, Sam Jones, Lowana Branter, and Christopher H. Peters), and two Sierra Club members (Timothy McKay and John Amadio). Defendants are R. Max Peterson, Chief, Forest Service, and John R. Block, Secretary of the United States Department of Agriculture. The State of California, acting through its Native American Heritage Commission, is the sole plaintiff in *California v. Block, et al.*, C-82-5943 SAW. Defendants are Secretary of Agriculture Block, Forest Service Chief Peterson, and Zane G. Smith, Jr., Regional Forester of the California Region of the Forest Service.

The 67,500 acre Blue Creek Unit is located in Del Norte and Humboldt counties in the northwestern corner of California. Approximately 31,100 acres of the Unit is virgin Douglas Fir forest, and has been inventoried by the

Forest Service as a roadless area.<sup>1</sup> On its northern boundary, the Unit adjoins the Eight-mile and Siskiyou inventoried roadless areas. Blue Creek itself, located within the Unit, is a tributary to the Klamath River and contains important spawning habitat for several anadromous fish species.<sup>2</sup>

On November 12, 1974, the Forest Service first proposed in a Draft Environmental Statement (DES) various land use management plans for the Blue Creek Unit. See Def.Ex. A. The Forest Service then issued a Supplemental DES (SDES) in 1975, see Def.Ex. B, and a Final Environmental Statement (FES) on May 21, 1975. See Def.Ex. C. On February 19, 1981, Regional Forester Smith selected Alternative E from among the alternative land use plans proposed in the FES. The Forest Service subsequently modified Alternative E and issued its recommended management plan in a document entitled "Blue Creek Unit Implementation Plan" (the Management Plan). See Def.Ex. J. The Management Plan calls for the harvesting over the next 80 years of 733 million board feet of timber from the Blue Creek Unit. *Id.* at 4.

On November 7, 1977, the Forest Service proposed various alternative routes for the Chimney Rock Section of the G-O road designed to link the existing Summit Valley and Dillon-Flint Sections of the road. These various routes are all located within the Blue Creek Unit.

<sup>1</sup> See *State of California v. Bergland*, 483 F.Supp. 465, 471-73 (E.D.Cal.1980) (describing roadless area program), *modified*, 690 F.2d 753 (9th Cir.1982).

<sup>2</sup> Anadromous fish spend their adult lives in the ocean but return to fresh water rivers and streams to spawn. Anadromous species present in Blue Creek include Chinook Salmon, Coho Salmon, King Salmon, and Steelhead Trout. *Tr.* at 940-41. Spawning gravels in Blue Creek account for approximately 5% of the anadromous fish production of the Klamath River system.

See Def.Ex. E. On March 2, 1982, Regional Forester Smith selected Alternative D-4 as the proposed route for the Chimney Rock Section. See Def.Ex. G.

Following exhaustion of their administrative appeals of both Forest Service decisions, plaintiffs filed these suits alleging that the challenged decisions violate: (1) the First Amendment of the Constitution of the United States; (2) the American Indian Freedom of Religion Act of 1978 (AIFRA), 42 U.S.C. § 1996; (3) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (4) the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights; (6) the Administrative Procedure Act, 5 U.S.C. § 706; (7) the Multiple Use Sustained-Yield Act, 16 U.S.C. §§ 528-31; and (8) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.* Plaintiffs moved for a preliminary injunction to prevent the Forest Service from soliciting competitive bids on the Chimney Rock Section of the G-O road. On December 17, 1982, the Court denied preliminary injunctive relief and, based upon defendants' assurance that no construction would occur prior to the Court's ruling on the merits, instead chose to conduct an early trial. See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F.Supp. 951 (N.D.Cal.1982).

Based upon the evidence presented at trial, the Court finds that the challenged Forest Service decisions violate (1) the First Amendment of the Constitution of the United States; (2) NEPA and the Wilderness Act; (3) the Federal Water Pollution Control Act; (4) Indian water and fishing rights on the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights; and (5)

the Administrative Procedure Act. This memorandum constitutes the Court's findings of fact and conclusions of law.

### I. The First Amendment

In reviewing the nature of the religious beliefs involved in this case, it must be remembered that their unorthodox character is no basis for denial of the protection of rights guaranteed by the Free Exercise Clause. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). Thus, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

The northeastern corner of the Blue Creek Unit is considered sacred land by members of the Yurok, Karok, and Tolowa Indian tribes.<sup>3</sup> This region is known as the "high country." Although the high country includes the highest mountain peaks in this corner of the Blue Creek Unit, such as Chimney Rock, Doctor Rock, and Peak 8, the area considered sacred encompasses an entire region rather than simply a group of individual sites (Def.Ex. G-K, Theodoratus Report (hereinafter "Theo.Rpt."), at 419). The Indian plaintiffs and the State of California assert that either construction of Alternative D-4 (hereinafter the Chimney Rock Section) or implementation of the Management Plan would desecrate the high country in violation of the Indian plaintiffs' rights under the Free Exercise Clause of the First Amendment.

<sup>3</sup> Secrecy surrounding religious use of the high country makes estimation of the number of users difficult. See Tr. at 247. Nevertheless, it appears that between 110 and 140 members of these tribes make current use of the high country for religious purposes, although the nature and frequency of such use varies widely among these individuals. See Tr. at 84-89. This number does not include the much larger group of tribal members who participate in religious ceremonies involving use of the high country. See Tr. at 109-13.



The Indian plaintiffs' use of the high country for religious purposes is not in dispute. Ceremonial use of the high country by the Yurok, Karok, and Tolowa tribes dates back to the early nineteenth century (Trial transcript (hereinafter "Tr.") at 267-68) and probably much earlier (Theo.Rpt. at 230-73, 386). Members of these tribes currently make regular use of the high country for several religious purposes. Individuals hike into the high country and use "prayer seats" located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal "power" through "engaging in emotional [and] spiritual exchange with the creator" (Tr. at 79). Such exchange is made possible by the solitude, quietness, and pristine environment found in the high country. Certain key participants in tribal religious ceremonies such as the White Deerskin and Jump Dances<sup>4</sup> must visit the high country prior to the ceremony to purify themselves and to make "preparatory medicine" (Theo.Rpt. at 46). The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community (Tr. at 110-13; Theo.Rpt. at 417). Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines (Tr. at 237-39). They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances (*Id.*; Theo.Rpt. at 52-58).

For a number of reasons, the Indian plaintiffs contend that construction of the Chimney Rock Section would violate the sacred qualities of the high country and impair its successful use for religious purposes. First, they claim, visibility of the road from religious sites would damage the pristine visual conditions found in the high country that

<sup>4</sup> Tr. at 227. These dances provide the periodic "World Renewal" that is essential to the Indians' religious belief system. See Theo.Rpt. at 45-49.

are essential for its religious use (Tr. at 239; Theo.Rpt. at 419-20). (The Chimney Rock Section would dissect the high country, and separate Chimney Rock to the north from Peak 8 and Doctor Rock to the south.) Second, increased aural disturbances from construction and use of the road would similarly impair the success of religious and medicinal quests into the high country.<sup>5</sup> Third, environmental degradation of the high country resulting from construction of the road would erode the religious significance of the areas (Theo.Rpt. at 420). Finally, religious use of the area would be impaired by increased recreational use resulting from construction of the Chimney Rock Section (Theo.Rpt. at 418-19).

The Management Plan calls for the harvesting of timber and the construction of approximately 200 miles of logging roads in areas immediately adjacent to Chimney Rock, Doctor Rock, Peak 8, and to other religious sites within the high country. The Forest Service has proposed "protective zones" around Chimney Rock, Doctor Rock, Peak 8, and a few other sites, which would forbid timber harvesting or the construction of logging roads within one-half mile of these locations. See Def.Ex. C, at 224-25; Def.Ex. J. Even so, plaintiffs urge that these protective zones would fail significantly to mitigate the adverse visual, aural, and environmental impacts of logging activities on the high country's salient religious characteristics.<sup>6</sup>

<sup>5</sup> The Forest Service estimates that an average of 76 logging and 92 other vehicles would traverse the Chimney Rock Section every day. Def.Ex. G, at 34.

<sup>6</sup> The religious integrity of the high country rests on the pristine qualities of the entire area rather than on just a few individual sites. Theo.Rpt. at 419. Because many of the most important sites are located at the highest elevations, the visual impact of logging the valleys between these peaks could not be mitigated. See Tr. at 239. In addition, under the Management Plan the "Golden Stairs Trail,"



### A. The Free Exercise Clause

The First Amendment forbids infringement of the free exercise of religion. Government action violates the Free Exercise Clause if it imposes a burden on the free exercise of religion unless the government establishes "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1971); see *Sherbert v. Verner*, 374 U.S. 398, 403-09, 83 S.Ct. 1790, 1793-96, 10 L.Ed.2d 965 (1962). Furthermore, "only those interests of the highest order \* \* \* can overbalance legitimate claims to the free exercise of religion." *Yoder*, *supra*, 406 U.S. at 215, 92 S.Ct. at 1533. Even if the government advances such an interest, it must demonstrate that no other means of serving that interest exists which is less restrictive of plaintiffs' First Amendment rights. See, e.g., *Sherbert*, *supra*, 374 U.S. at 407-08, 83 S.Ct. at 1795-96; *Murdock v. Pennsylvania*, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 307-08, 60 S.Ct. 900, 904-05, 84 L.Ed. 1213 (1939).

Relatively few courts have faced claims similar to those advanced by the Indian plaintiffs in this case. A majority of those courts concluded that the challenged government activity did not burden the free exercise of Indian religious practices. In *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.) *cert. denied*, 449 U.S. 953, 101 S.Ct. 357, 66 L.Ed.2d 216 (1980), members of the Cherokee Indian tribe brought suit to enjoin completion of the Tellico Dam on the Little Tennessee River on the ground that if completed the dam would flood their "sacred homeland"

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which Indians on religious quests frequently use to reach the high country, would be "screened off" from logged areas on each side by strips of unlogged land only one-eighth mile in width. Def.Ex. C, at 224.

and destroy various sites of cultural and medicinal importance to their tribe. The court of appeals upheld the district court's grant of summary judgment for defendant based on plaintiffs' failure to demonstrate the centrality of the land to be flooded to the practice of their religion. *Id.* at 1164. Thus, the court of appeals concluded that plaintiffs had shown that the challenged action would burden their "cultural history and tradition" rather than any interest protected by the Free Exercise Clause. *Id.* at 1165.

In *Crow v. Gullet*, 541 F.Supp. 785 (D.S.D.1982), members of the Lakota and Tsistsistas Indian tribes alleged that South Dakota's construction of roads and parking lots had disturbed the natural features of Bear Butte, a site of religious significance to the Indians located in the Black Hills. In addition, plaintiffs asserted that the state had failed to control tourist behavior that interfered with plaintiffs' religious practices on the Butte, and that the state's regulation of Indian campers visiting the Butte similarly interfered with the religious practices of those campers. The district court granted defendants' motion for summary judgment on the ground that defendants' construction did not burden plaintiffs' religious practices but instead facilitated them by improving Indian access to, and diverting tourists from, Bear Butte. The court also found that the "distractions" caused by occasional tourist "misbehavior" on the Butte did not interfere with plaintiffs' religious practices, and that various permit requirements and other regulations imposed on Indian campers at the Butte did not impede their ability to engage in religious practices. *Id.* at 791-93.

In *Hopi Indian Tribe v. Block*, 8 ILR 3073 (D.D.C. June 15, 1981), plaintiffs sought to prevent further development of recreational facilities known as the Arizona Snow Bowl located in the San Francisco Peaks region of Coconino National Forest. They claimed that such development would disturb Indian deities inhabiting

the Peaks. The court concluded that the proposed development "[would] not impinge upon the continuation of all essential ritual practices," *id.* at 3075, and granted defendants summary judgment.

One court has directly addressed the issue of what state interests may justify a government-imposed burden on Native American religious practices. In *Badoni v. Higginson*, 638 F.2d 172 (10th Cir.1980), *cert. denied*, 452 U.S. 954, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981), certain Navajo Indians challenged the federal government's operation of Glen Canyon Dam and management of the Rainbow Bridge National Monument on the grounds that flooding resulting from the dam project had denied them access to a prayer spot sacred to the Navajos, and that the presence and behavior of tourists at Rainbow Bridge prevented the Navajos from conducting traditional religious ceremonies at sites near the Bridge. The court of appeals upheld the district court's grant of summary judgment for defendants, finding that maintenance of existing water levels in Glen Canyon Reservoir was "a crucial part of a multi-state water storage and power generation project," and that no less restrictive means of serving that interest existed.<sup>7</sup> *Id.* at 177. In addition, the court of appeals found that plaintiffs were not entitled to have tourists excluded from Rainbow Bridge National Monument, given the Park Service's "strong interest in assuring public access to th[at] natural wonder," and statutory duty to do so. *Id.* at 178.

In the present case, defendants concede that the Indian plaintiffs' use of the high country for religious practices is entitled to First Amendment protection. The Indian plaintiffs' claim that the high country is sacred is both sincerely held and "rooted in religious belief." *Yoder, supra*, 406

<sup>7</sup> The court of appeals did not reach the issue whether the flooding constituted a burden on plaintiffs' free exercise of religion. *Badoni, supra*, 638 F.2d at 177, n. 4.

U.S. at 215-16, 92 S.Ct. at 1533. The unorthodox character of those religious beliefs does not deprive them of the safeguards contained in the Free Exercise Clause. *See, e.g., Thomas, supra*, 450 U.S. at 714, 101 S.Ct. at 1430. Similarly, plaintiffs' lack of a property interest in the high country does not release defendants from the constitutional responsibilities the First Amendment imposes on them.<sup>8</sup> *See Badoni, supra*, 638 F.2d at 176; *Sequoyah, supra*, 620 F.2d at 1164.

#### 1. *A Burden on the Free Exercise of Religion*

The first step in evaluating plaintiffs' claim based upon their constitutional right to the free exercise of religion is to determine whether the challenged actions do burden that right. The evidence establishes that construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indian plaintiffs' use of the high country for religious practices.

<sup>8</sup> Of course, no First Amendment right exists to assemble in a busy traffic intersection for religious purposes or on a public sidewalk thronging with pedestrians. In such cases, a strong public interest in maintaining public safety and order outweighs any religious interests involved. *See, e.g., Food Employees v. Logan Plaza*, 391 U.S. 308, 320-21, 88 S.Ct. 1601, 1609, 20 L.Ed.2d 603 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464 13 L.Ed.2d 471 (1965); *Niemotko v. Maryland*, 340 U.S. 268, 288-89, 71 S.Ct. 325, 336, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring). Nevertheless, the government must attempt to accommodate the legitimate religious interests of the public when doing so threatens no public interest, even when those religious interests involve use of public property. *See Sherbert v. Verner*, 374 U.S. 398, 404-05, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963); *Niemotko, supra*, 340 U.S. at 289, 71 S.Ct. at 336 (Frankfurter, J., concurring). This is especially true when government action threatens religious conduct *per se* rather than merely inconveniencing that conduct through imposition of restrictions reasonable as to time, place, or manner.



For generations, individual members, spiritual leaders, and medicine persons of the Yurok, Karok, and Tolowa tribes have traveled to the high country to communicate with the "great creator," to perform rituals, and to prepare for specific religious and medicinal ceremonies. Such use of the high country is "central and indispensable" to the Indian plaintiffs' religion. See, e.g., *Sequoyah*, *supra*, 620 F.2d at 1164; *Hopi*, *supra*, 8 ILR at 3075. For the Yurok, Karok, and Tolowa peoples, the high country constitutes the center of the spiritual world. No other geographic areas or sites hold equivalent religious significance for these tribes. Further, use of the high country is essential to performing the "World Renewal" ceremonies, such as the White Deerskin and Jump Dances, which constitute the heart of the Northwest Indian religious belief system (Theo.Rpt. at 45-49). Finally, use of the high country in training young persons in the tribes in traditional religious beliefs and ceremonies is necessary to preserve such practices and to convey them to future generations (Tr. at 77). Degradation of the high country and impairment of such training would carry "a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today." *Yoder*, *supra*, 406 U.S. at 218, 92 S.Ct. at 1534.

Communication with the "great creator" is possible in the high country because of the pristine environment and opportunity for solitude found there (Theo.Rpt. at 419-20). Construction of the Chimney Rock Section and/or the harvesting of timber in the high country, including "clear-cutting,"<sup>9</sup> would seriously damage the salient visual, aural, and environment qualities of the high

<sup>9</sup> Under clear-cutting or "even age management" techniques, all timber in the area is removed in one cut and the area is replanted. See Tr. at 481; *Texas Comm. on Nat'l Resources v. Bergland*, 573 F.2d 201, 205 (5th Cir.), cert. denied, 439 U.S. 966, 99 S.Ct. 455, 58 L.Ed.2d 425 (1978).

country. The Forest Service's own study concluded that "[i]ntrusions on the sanctity of the Blue Creek high country are \* \* \* potentially destructive of the very core of Northwest [Indian] religious beliefs and practices" (Theo.Rpt. at 420).

Upon careful analysis, it will be seen that prior cases involving Indian religious claims support the conclusion that the government actions proposed here burden the free exercise of plaintiffs' religion. Unlike the present case, plaintiffs in *Sequoyah* did not claim that the area threatened with flooding played a central role in the practice of their religion, and in fact failed to demonstrate that there had been significant past use of the area for religious purposes. 620 F.2d at 1163-64. Likewise, plaintiffs in *Hopi* failed to show that the 777 acre parcel planned for development within the 75,000 acre San Francisco Peaks region was "central or indispensable to their religion. 8 ILR at 3075. In *Crow v. Gullet*, there was no claim that the challenged actions did more than possibly inconvenience Indian worshippers at Bear Butte by, for example, requiring campers to register with park officials. 541 F.Supp. at 791-93.

Other cases directly support the conclusion that the proposed Forest Service actions impose an unlawful burden on the free exercise of plaintiffs' religion. In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1962), the Supreme Court held that a state law disqualifying a member of the Seventh-Day Adventist Church from eligibility for unemployment compensation based upon her unavailability for Saturday work due to observance of the Sabbath imposed an unlawful burden on the free exercise of her religion. The Court found such a burden to exist even though it constituted "the denial of \* \* \* a benefit or privilege," and was "only an indirect result of welfare legislation within the State's general competence to enact \* \* \*". *Id.* at 403-04 & n. 5, 83 S.Ct. at 1793-94 & n. 5; see also *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92



S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1971); *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250, 1254 (Colo.1973). In a case also involving Indian religious practices, *People v. Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964), the California Supreme Court overturned the convictions of a group of Navajo Indians for unlawful use of peyote on the ground that use of the drug constituted an integral element of their religious practices.

## 2. Overriding State Interest

Once a burden on the free exercise of religion is established, "only those interests of the highest order" can uphold the challenged government action. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). Defendants assert that construction of the Chimney Rock Section of the G-O road would (1) increase the quantity of timber accessible to harvesting in the Blue Creek Unit; (2) stimulate employment in the regional timber industry; (3) provide recreational access to the Blue Creek Unit as well as permit through recreational traffic on the G-O road; (4) further the efficient administration of Six Rivers National Forest by the Forest Service; and (5) increase the price of bids on future timber sales in the Orleans area of Six Rivers National Forest by decreasing the cost of hauling such timber to timber mills located in Del Norte County (Tr. at 1258-59). Defendants also contend that implementation of the Management Plan would increase timber production in the Blue Creek Unit, thereby stimulating the regional timber industry and increasing Forest Service revenues, a fixed proportion of which is returned to the four counties partly located in Six Rivers National Forest.

Construction of the Chimney Rock Section would not materially serve several of the claimed governmental interests. First, the Forest Service concedes that construction

of the Chimney Rock Section would not improve access to timber resources in the Blue Creek Unit. That timber could be harvested without building the Chimney Rock Section (Tr. at 1298; Def.Ex. G, App. B, at 1). Second, completion of the Chimney Rock Section would result in no net increase in the number of jobs in the regional timber industry. The most it would accomplish would be the transfer of a certain number of jobs from Humboldt County to Del Norte County (Tr. at 1305). Third, increased recreational access to the area as a result of construction of the Chimney Rock Section cannot support infringement of plaintiffs' First Amendment rights. Recreational access to the area currently exists, and the Forest Service projects that an average of only eight vehicles per day would use the road for recreational purposes (Def.Ex. G, at 34). Moreover, although recreational access to the area by means of motor vehicles would be somewhat improved, resulting environmental degradation would decrease the area's suitability for primitive recreational use.

The remaining interests defendants offer in support of construction of the Chimney Rock Section fall far short of constituting the "paramount interests" necessary to justify infringement of plaintiffs' freedom of religion. *Sherbert, supra*, 374 U.S. at 406, 83 S.Ct. at 1795. Construction of the road would not greatly improve the efficient administration of Six Rivers National Forest. The Forest Service is currently able efficiently to provide all needed administrative services to the Chimney Rock-Doctor Rock area (Tr. at 1333). In fact, several such services, such as insect control, habitat improvement, and monitoring of visitors, are provided on a districtwide rather than forestwide basis. Thus, provision of these services in the Blue Creek Unit would be shared by the district rangers stationed in Orleans and Gasquet regardless of whether the Chimney Rock Section is constructed. Hence, construction of the

road would not make the provisions of these services significantly more efficient (Tr. at 1324-26). The Forest Service's interest in more efficiently providing road maintenance and fire protection cannot justify infringement of the free exercise of plaintiffs' religion. Both services are efficiently provided at present.

Defendants' claim that construction of the Chimney Rock Section would increase competition for timber in the Orleans area of Six Rivers National Forest, and thus increase Forest Service revenues. This claim is too speculative to support infringement of plaintiffs' First Amendment rights. Although construction of the Chimney Rock Section would reduce timber haul costs from the Orleans region to Del Norte County mills, no increase in bid prices on timber sales in the Orleans area would result unless Del Norte County mills can effectively compete for sales in the Orleans region. A large number of mills in Humboldt County currently compete for these sales. See Pl.Ex. 45(a). Defendants failed to introduce any evidence whatever establishing the likely effect of the road construction on regional timber markets. See Tr. at 1159-62, 1166-67, 1258; Def.Ex. E, at 107-08, App. D & E. Such speculative and diffuse goals as these cannot provide the basis for denying plaintiffs' free exercise claim. See *Sherbert, supra*, 374 U.S. at 407, 83 S.Ct. at 1795.

Past investment of resources in existing paved sections of the G-O road does not justify construction of the Chimney Rock Section. Those sections of the G-O road provide improved and useful access to vast recreational, timber, and other resources in the region (Tr. at 1298, 1332-33).

Harvesting of timber from the Blue Creek Unit pursuant to the Management Plan would not serve any compelling public interest. That timber is a small fraction of the timber resources found in the entire Six Rivers National Forest. Its harvesting would not significantly affect

timber supplies. Moreover, the regional timber industry will not suffer greatly without access to timber in the Unit. Finally, even if defendants could demonstrate a compelling need for additional timber harvesting in the Blue Creek Unit, means less restrictive of plaintiffs' First Amendment rights than the Management Plan exist that would satisfy that need. The Management Plan could easily be more narrowly tailored to accommodate Indian religious use of the high country and at the same time exploit most of the timber resources present in the Blue Creek Unit. See Def.Ex. C, at 118-25 (discussing Alternatives A & B); Tr. at 1312-15 (possibility of increasing size of Indian religious protective zones).

#### B. *The Establishment Clause*

Defendants assert that the grant of an injunction preventing construction of the Chimney Rock Section or implementation of the Management Plan based upon the Indian plaintiffs' free exercise claim would create a government-managed "religious shrine" in violation of the Establishment Clause of the First Amendment. This assertion is without merit. Actions compelled by the Free Exercise Clause do not violate the Establishment Clause. In the present case, the Forest Service failed to accommodate the Indian plaintiffs' religious practices to the extent required by the Free Exercise Clause. Government actions having the goal and effect of such accommodation and which do not result in excessive government entanglement with religion are consistent with the Establishment Clause.<sup>10</sup>

<sup>10</sup> Defendants do not argue that preservation of the high country as wilderness would lead to such entanglement. In fact, less entanglement would result if the high country were so preserved than if the Chimney Rock Section were constructed and the Forest Service attempted to regulate access to the high country. See *Crow v. Gullet*, 541 F.Supp. 785 (D.S.D.1982).



See, e.g., *Hunt v. McNair*, 413 U.S. 734, 741-49, 93 S.Ct. 2868, 2873-77, 37 L.Ed.2d 923 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). Otherwise, courts could not, based upon the need to accommodate legitimate religious practices, grant exemptions to laws requiring compulsory school attendance, see *Yoder, supra*, punishing use of peyote, see *People v. Woody, supra*, or fixing eligibility standards for unemployment compensation. see *Sherbert, supra*.

The nature of the relief the Indian plaintiffs seek supports the conclusion that accommodation of the Indian plaintiffs' free exercise rights does not entail excessive governmental entanglement with religion. Plaintiffs do not request that the Forest Service exclude recreational users from the Blue Creek Unit or regulate the behavior of those users in any way. Cf. *Badoni, supra*, 638 F.2d at 179; *Hopi, supra*, 8 ILR at 3075-76. Rather, plaintiffs contend that in reaching its decisions the Forest Service failed to weigh competing public interests, both secular and religious, in the manner prescribed by the First Amendment. Since plaintiffs prevail on that claim, the offending decisions of the Forest Service cannot stand.

## II. American Indian Religious Freedom Act of 1978

The Indian Plaintiffs also assert that construction of the Chimney Rock Section and implementation of the Management Plan would violate the American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996. That Act states "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions \* \* \*, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

The AIRFA "does not [expressly] create a cause of action in federal courts for violation of rights in religious freedom." *Crow v. Gullet*, 541 F.Supp. 785, 793 (D.S.D. 1982). Rather, at most it requires "that agencies evaluate their policies and procedures with the aim of protecting Indian religious freedoms." *Hopi Indian Tribe v. Block*, 8 ILR 3073, 3076 (D.D.C. June 15, 1981). The legislative history of the Act supports this interpretation. *Id.*; Pl.Ex. G, App. A.

Although defendants' proposed actions violate the Indian plaintiffs' First Amendment rights, defendants did make sufficient efforts to protect those rights to satisfy the requirements of the AIRFA. Defendants commissioned studies on Indian religious beliefs and practices, see Def.Ex. G-K & F, and held hearings at which Indian representatives testified. In addition, defendants selected the D-4 route for the Chimney Rock Section in part in order to lessen the road's adverse impacts on Chimney Rock (Def.Ex. G, at 53). Under these circumstances, defendants' decisions to construct the Chimney Rock Section and to implement the Management Plan comply with the mandate of the AIRFA.

## III. National Environmental Policy Act

In response to "the growing environmental problems and crises the Nation faces," S.Rep. 91-296, 91st Cong., 1st Sess. 4 (1969), Congress passed the National Environmental Policy Act (NEPA) and declared "a national policy [to] encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man \* \* \*" 42 U.S.C. § 4321. To assure that federal agencies comply with this mandate, Congress required them to prepare a detailed statement on the environmental impact of the proposed action in connection



with any federal actions "significantly affecting the quality of the human environment." The statement must cover any unavoidable adverse effects of the proposed action, alternatives to the proposed action, the relationship between short-term use of the environment and long-term productivity, and any irreversible commitments of resources required by the proposed action. 42 U.S.C. § 4332(2)(C).

The role of the courts in reviewing the adequacy of an environmental impact statement (EIS) is limited. In this circuit, an EIS must be upheld if it "reasonably set[s] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (citations omitted); see *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981).

#### A. *The Chimney Rock Section of the G-O Road*

Plaintiffs contend that the Final Environmental Impact Statement (FEIS) (Def.Ex. G) and Draft Environmental Statement (DES) (Def.Ex. E) prepared for the Chimney Rock Section of the G-O road are inadequate in that: (1) they fail to discuss adequately the impacts of the road on geologic and soil stability; (2) they fail to discuss adequately the impacts of the road on Indian cultural resources; (3) they contain an inadequate discussion of alternatives; (4) no supplemental EIS was prepared despite defendants' receipt of new information concerning the impact of the road on Indian cultural resources; and (5) they fail adequately to disclose the impact of the road (as well as the cumulative impact of the road and implementation of the Management Plan) on water quality and sedimentation in Blue Creek, and to describe proposed measures needed to mitigate adverse impacts on water quality.

These contentions are now examined *seriatim*.

#### 1. *Geologic and Soil Stability*

The FEIS fairly discloses the existence of slope stability problems along the proposed route for the Chimney Rock Section. The FEIS identifies the existence of dormant and active landslides along the proposed route (Def.Ex. G, at 45-46). In addition, the FEIS acknowledges that "cutbank and fillslope failures" of up to 1,000 cubic yards of soil and rock may occur as a result of the road construction. (Def.Ex. G-A, at 16). Thus, the FEIS admits the existence of these slope stability problems but states that they are comparable to those found along other sections of the G-O road (Def.Ex. G, at 43). Plaintiffs have not demonstrated that landslide activity along the proposed Chimney Rock Section would be significantly greater than that found along existing sections of the G-O road. Hence, the FEIS and DES fairly disclose the geologic and soil stability problems that construction of the Chimney Rock Section would pose.

#### 2. *Indian Cultural Resources*

Although the FEIS asserts that the proposed Chimney Rock Section would have less visual and audible impacts on Chimney Rock than would alternative routes, it unequivocally states that "all of the proposed routes will create an adverse impact [on Indian cultural resources]," and that "[s]ome impacts appear to be nonmitigatable" (Def.Ex. G, at 52-53). Further, the Theodoratus Report, adopted by the Forest Service, acknowledges that "[t]he nature of Northwest Indian perceptions of the high country and the requirements of their specific religious beliefs and practices associated with the high country make mitigation of the impact of construction of any of the proposed routes [for the Chimney Rock Section] impossible" (Theo.Rpt. at 420). Although the Forest Service gave in-

adequate weight to the religious interests at stake, the FEIS acknowledges the harsh impact that construction of the Chimney Rock Section would have on Indian religious use of the high country. NEPA requires no more. See *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981).

### 3. Discussion of Alternatives

An EIS must set forth those alternatives necessary to permit a reasoned choice by the decisionmaker. See *Brooks v. Coleman*, 518 F.2d 17, 19 (9th Cir. 1975). Plaintiffs assert that the Chimney Rock Section FEIS and DES "dismiss out of hand" the alternatives of not constructing the road (Alternative A) or of routing the road to avoid entirely the corridor between Chimney Rock and Doctor Rock (Alternatives E & E-F).

The FEIS does not support plaintiffs' claim. The FEIS evaluates Alternatives A, E, and E-F in a manner that parallels its analysis of other alternatives. See Def.Ex. G, at 39, 64-65. Alternatives E and E-F are evaluated based upon several factors, including length, construction and maintenance costs, steepest gradient, size of area disturbed, timber haul costs, and driveability. See *id.* at 39 (Table 10). The FEIS ultimately rejects these alternatives based upon their excessive length, construction cost, and haul cost, see *id.* at 41, conclusions that plaintiffs did not effectively challenge at trial. Hence, the FEIS contains an adequate discussion of alternatives. See *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 593 (9th Cir. 1981); *Ventling v. Bergland*, 479 F.Supp. 174, 180-81 (D.S.D.), *aff'd*, 615 F.2d 1365 (8th Cir. 1979).

### 4. Supplemental Environmental Impact Statement

Plaintiffs contend that after issuing the Chimney Rock Section FEIS on March 2, 1982, defendants received new information concerning Indian cultural resources in the

Blue Creek Unit that required them to prepare a supplemental EIS. Such a supplement must be prepared if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (1982).

Plaintiffs offered no evidence in support of this contention at trial. In fact, the evidence contradicts it. The Theodoratus Report, commissioned by the Forest Service, was completed and made available to the Forest Service on April 9, 1979, almost three years before the Chimney Rock Section FEIS was completed. Similarly, Dr. Winter's review of the Theodoratus Report (Def.Ex. F) was completed in May, 1979. The FEIS incorporates the findings of these studies, which are the most comprehensive available of Indian religious beliefs and practices. Consequently, no supplemental EIS was required.

### 5. Water Quality

Plaintiffs contend that the Chimney Rock Section FEIS and DES are inadequate in that they: (1) fail sufficiently to disclose the impact of the road construction on water quality; (2) fail to discuss the cumulative impact of the road construction and implementation of the Management Plan on water quality; and (3) fail adequately to describe what measures would be taken to mitigate adverse impacts on water quality. The FEIS and DES are deficient in all three respects.

First, the FEIS and DES fail to disclose the major increase in sediment in Blue Creek likely to result from construction of the Chimney Rock Section. The FEIS asserts:

The use of [Best Management Practices] should minimize any increased sedimentation in Blue Creek [resulting from construction of the road]. If a small amount of sedimentation does occur, the increased



sediment could result in a small decrease in water quality. The increased sediment would add to the bed loads of the creeks within the sub-basin \* \* \* \* There are no indications that any beneficial use will be measurably affected, directly or indirectly in the short or long term future.

Def.Ex. G, at 47. By contrast, the evidence establishes that construction of the Chimney Rock Section would result in as much as a 500% increase in sediment loads in Blue Creek (Tr. at 444). The vast majority of the Blue Creek Unit consists of steep, unstable terrain. Elevations in the Unit range from 1,200 to 6,000 feet above sea level. Because of heavy annual rainfall in the Unit, over 90% of the terrain has a "high erosion hazard rating." Furthermore, the D-4 route travels the closest to Blue Creek of any of the alternatives considered in the FEIS that traverse the Chimney Rock-Doctor Rock corridor. Consequently, it poses the greatest hazard to increased sedimentation in Blue Creek. A single minor landslide along the proposed route would dramatically raise sediment levels in Blue Creek (Tr. at 446-47), thereby violating state water quality standards and endangering fish spawning habitat downstream (Tr. at 948).

In addition, the FEIS's conclusion that no significant increase in sedimentation in Blue Creek would occur is based on geologic assumptions contradicted by the DES and by the FEIS itself. In predicting the level of sedimentation likely to result from construction of the Chimney Rock Section, the DES assumes that no debris slides, rockslides, or small landslides will occur because "there [is] no justifiable way to predict such [slope] failures" (Def.Ex. E, at 147). Yet both the DES and FEIS themselves predict that various types of slope failures including debris slides are likely to occur as a result of construction and that such failures would involve up to 400 cubic yards of debris per

mile of road per year.<sup>11</sup> Def.Ex. G, at 43; see Def.Ex. G-A, at 16 (slope failures of "50 to 1,000 cubic yards may occur"). Thus because the analyses of water quality in the DES and FEIS ignore the predictions of slope failure contained in those same documents, those analyses misleadingly understate levels of sedimentation likely to result from construction of the Chimney Rock Section.

Furthermore, both the FEIS and DES recognize the uncertainty involved in predicting landslide occurrence and resulting sedimentation. See Def.Ex. G, at 46; Def.Ex. E, at 147. Neither document, however, discusses the risks derived from such uncertainty in terms of potential impacts on water quality and fish habitat in Blue Creek. An EIS must reveal the risks of uncertainty if they appear substantial. See, e.g., *State of Alaska v. Andrus* 580 F.2d 465, 473 (D.C.Cir.), *vacated in part*, 439 U.S. 922, 99 S.Ct. 303, 58 L.Ed.2d 315 (1978).

Second, the FEIS and DES fail to discuss the cumulative impact of construction of the Chimney Rock Section and implementation of the Management Plan on water quality and fish habitat in Blue Creek. It is well established that an EIS must discuss the cumulative impact of the proposed action and of "reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (1981); see *Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n. 20, 96 S.Ct. 2718, 2730 & n. 20, 49 L.Ed.2d 576 (1976); *South Louisiana Environ. Coun. v. Sand*, 629 F.2d 1005, 1015-16 (5th Cir. 1980); *Colony Fed. Sav. & Loan v. Harris*, 482 F.Supp. 296, 302 (W.D.Pa.1980); 40 C.F.R. §§ 1508.25(a)(2), (c) (1981); 40 C.F.R. § 1500.8(a)(1) (1978); see also *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 783 (9th Cir.1980). Otherwise, an EIS could fail to disclose "indi-

<sup>11</sup> Thus, the FEIS and DES adequately disclose the possible geologic impacts of construction but then fail to disclose the probable adverse effect of those impacts on water quality and fish habitat in Blue Creek.



vidually minor but collectively significant" adverse environmental impacts.<sup>12</sup> 40 C.F.R. § 1508.7 (1981).

Various land use plans urging timber harvesting in the Blue Creek Unit were proposed years before the Forest Service prepared the DES and FEIS for the Chimney Rock Section. See Def.Ex. A (Blue Creek DES). Thus, at the time those documents were prepared, the Management Plan was a "reasonably foreseeable future action" within the meaning of 40 C.F.R. § 1508.7 (1981). Nevertheless, and despite the Forest Service's prediction that the Management Plan would adversely affect aquatic resources in Blue Creek (Def.Ex. C, at 196), neither the FEIS nor the DES discuss the cumulative impact of construction of the road and implementation of the Management Plan on water quality and fish habitat in Blue Creek. See Def.Ex. G, at 47, 49-50; Def.Ex. E, at 82-83, 88. Furthermore, the cumulative effects of the two projects on water quality would be significant (Tr. at 956-57). Natural sedimentation in Blue Creek is sufficiently high that even a small increase would impair the emergence and survival of young anadromous fish (Tr. at 948). The failure of the FEIS and DES to discuss this cumulative impact renders them inadequate under NEPA. See, e.g., *Natural Re-*

<sup>12</sup> Any such failure could be the cause of flawed decisionmaking in the future. For example, one justification defendants offer for constructing the Chimney Rock Section is to improve access to timber in the Blue Creek Unit. If the road were built in part to serve that goal, and without consideration of cumulative impacts, subsequent timber harvesting in the Unit might be rejected based on the then apparent cumulative adverse effect of both actions on water quality in Blue Creek. Perhaps more likely, the expenditure of resources to construct the road might then be asserted as a justification for timber harvesting in the Unit regardless of the environmental consequences. See, e.g., Def. Administrative Record, Ex. 1-11, at 1 ("Forest Service actions since the 1960's, in constructing segments of the G-O Road, have apparently foreclosed every alternative to the Chimney Rock Section that might otherwise be feasible and prudent.").

*sources Defense Coun. v. Callaway*, 524 F.2d 79, 87-90 (2d Cir.1975); *Natural Resources Defense Coun. v. Grant*, 355 F.Supp. 280, 288-89 (E.D.N.C.1973).

Third, the FEIS and DES for the Chimney Rock Section fail adequately to describe measures to mitigate adverse impacts on water quality and fish habitat in Blue Creek. An EIS must discuss "[m]eans to mitigate adverse environmental impacts" of the proposed action. 40 C.F.R. § 1502.16(h) (1982); see *Prince George's County v. Holloway*, 404 F.Supp. 1181, 1187 (D.D.C.1975); *Simmons v. Grant*, 370 F.Supp. 5, 21-22 (S.D.Tex.1974); cf. *Foundation for N. Am. Wild Sheep v. United States*, 681 F.2d 1172, 1180-82 (9th Cir.1982) (EIS required where mitigation measures insufficiently supported by data and analysis). Rather than identifying what mitigation measures would be used and providing a reasoned basis for its conclusion that they would be effective, the FEIS simply asserts that "[t]he use of the BMP's [Best Management Practices] should minimize any increased sedimentation in Blue Creek" (Def.Ex. G, at 47). The DES similarly fails to describe or analyze any mitigation measures other than by listing a few terms and phrases<sup>13</sup> (Def. Ex. E, at 492). The general invocation of the term "Best Management Practices" does not satisfy the NEPA requirement that an EIS discuss measures to mitigate the proposed action's adverse environmental impacts.

#### B. *The Blue Creek Management Plan*

Plaintiffs also assert that the DES (Def.Ex. A), SDES (Def.Ex. B), and FES (Def.Ex. C) prepared for the Blue Creek Management Plan are inadequate on the grounds that: (1) their cost-benefit analysis contains certain economic distortions; (2) a supplemental EIS should have

<sup>13</sup> E.g., "Import topsoil," "Mulch," and "Employ good planting methods." Def.Ex. E, at 492.

been prepared for the Management Plan; (3) they inadequately describe measures to mitigate adverse impacts on water quality in Blue Creek; and (4) they inadequately discuss the impact of the Management Plan on the wilderness resource potential of the Blue Creek Unit.

### 1. *Cost-Benefit Analysis*

Plaintiffs urge that the cost-benefit analysis of the Management Plan contained in the FES (Def.Ex. C, App. G) contains economic distortions that render it inaccurate and misleading. Specifically, they assert that increases in timber harvesting costs and decreases in the price of timber since 1975 cast doubt on whether it is economically feasible to harvest timber in the Blue Creek Unit.

These variations in the costs and prices associated with timber harvesting are not so large as to invalidate the FES. Some fluctuations in costs and prices between the preparation of a FES and commencement of the project is inevitable (Tr. at 1148). In addition, because the Management Plan proposes timber harvesting over an 80 year period, the Forest Service must decide whether a particular sale is likely to be profitable at the time that sale is proposed. Thus, the cost-benefit analysis contained in the FES satisfies the requirements of NEPA.

### 2. *Supplemental Environmental Impact Statement*

Plaintiffs contend that a supplemental EIS should have been prepared for the 1981 Management Plan because that Plan modified the 1975 FES by reducing the amount of timber to be harvested from the Blue Creek Unit by approximately 21% and increasing the amount of acreage devoted to watershed protection and "Indian Cultural Areas." Def.Ex. J, at 3-4. NEPA requires preparation of a supplemental EIS if "[t]he agency makes substantial

changes in the proposed action that are relevant to environmental concerns \* \* \* \* 40 C.F.R. § 1502.9(c)(1) (1982).

The Management Plan, adopted in 1981, modified Alternative E of the 1975 FES by reducing the amount of timber to be harvested from the Blue Creek Unit. Plaintiffs do not argue that these modifications would have adverse environmental impacts. On the contrary, decreasing the quantity of timber to be harvested from the Unit would lessen the adverse impacts of the proposed Management Plan. Requiring a further EIS under these circumstances in addition to the DES, SDES, and FES already prepared by the Forest Service would not serve the purposes of NEPA, but would penalize the Forest Service for attempting to accommodate the religious and environmental concerns of plaintiffs.

### 3. *Mitigation Measures*

Plaintiffs assert that the FES fails to discuss measures to mitigate the adverse impact of the Management Plan on water quality in Blue Creek. Regulations in effect at the time the 1975 FES was prepared require that an EIS contain "a clear statement of how \* \* \* avoidable adverse effects \* \* \* will be mitigated." 40 C.F.R. § 1500.8(a) (1973); *see Prince George's County, supra*, 404 F.Supp. at 1187; *Simmans, supra*, 370 F.Supp. at 21-22.

The FES acknowledges that "[t]he projected sediment increases of four to 19 percent [resulting from the Management Plan] would have an adverse effect upon the aquatic resource [in Blue Creek]," but discusses mitigation measures only by asserting that "[t]his [adverse] impact would be mitigated by progressive stabilization of the watershed in the years immediately following disturbances" (Def.Ex. C, at 196). This assertion neither iden-



tifies what specific mitigation measures will be taken nor evaluates the efficacy of those measures.<sup>14</sup> This failure renders the FES deficient under NEPA.

#### 4. Wilderness Resource

Plaintiffs contend that the failure of the FES to assess the impact of the Management Plan on the wilderness resource potential of the Blue Creek roadless area as part of the larger contiguous roadless area consisting of the Blue Creek, Eightmile, and Siskiyou roadless areas violates both NEPA and the Wilderness Act, 16 U.S.C. § 1132(b). NEPA requires that an EIS disclose the impact of a proposed action on the wilderness resource potential of any area eligible for inclusion in the National Wilderness Preservation System. *California v. Block*, 690 F.2d 753, 764 (9th Cir. 1982). Congress created that system in 1964 to provide statutory protection for "areas that are relatively untouched by humankind. 16 U.S.C. § 1131 (1976)." *Id.* at 757. Similarly, the Wilderness Act requires the Forest Service to review "for preservation as wilderness, each area in the national forests classified \* \* \* as 'primitive' and report [its] findings to the President." 16 U.S.C. § 1132(b).

The FES evaluates the impact of the Management Plan on the suitability for wilderness designation of the Blue Creek, Eightmile, and Siskiyou roadless areas as separate areas rather than as a potential single wilderness area on the ground that "[t]he Blue Creek roadless area is separated from the Eightmile and Siskiyou roadless units by a corridor containing a low standard road which is [in] the general location of the proposed Gasquet-Orleans road." Def.Ex. C, at 82; *see id.* at 88-96. Similarly, the

<sup>14</sup> Although the 1981 Management Plan does propose the use of stream protective zones, it fails to evaluate the effectiveness of such zones in reducing sedimentation. *See* Def.Ex. J, at 2.

Forest Service denied plaintiffs' administrative appeal of this issue on the ground that

Blue Creek was "separated" from Eight Mile during the RARE I inventory on the premise that a primitive road suitable only for 4-wheel drive vehicles separates them. The decision to treat the Eight Mile roadless area and the Blue Creek roadless area as distinct entities was made during the RARE I inventory process, and validated by the RARE I FES (October 1973) and the subsequent decision (in October 1976) to adopt the Blue Creek Plan. This Plan as it treats roadless area evaluation is consistent with the RARE I process: It merely incorporates RARE I results. Therefore, on the basis of timeliness, the decision to consider the Blue Creek roadless area as a separate area in the Plan is not a matter open to appeal.

Def.Ex. I-1(6), at 2.

The Forest Service's separation of the Blue Creek roadless area from the Eightmile and Siskiyou roadless areas for purposes of evaluating the wilderness potential of those areas is inconsistent with Forest Service guidelines governing that agency's inventory of all roadless and undeveloped lands in the National Forest System pursuant to the Wilderness Act. Forest Service Manual (FSM) § 8260(B)(3)(a)(1) defines "roadless area" as "[a]n area of undeveloped Federal Land within which there are not improved roads maintained for travel by means of motorized vehicles intended for highway use" (Def.Ex. RR, at 3). Defendants acknowledge that the "jeep trail" that currently connects the Dillon-Flint and Summit Valley Sections of the G-O road does not constitute an "improved road" within the meaning of FSM § 8260(B)(3)(a)(1). Def.Ex. E, at 8; Tr. at 1267-68, 1323. That trail cannot be traversed by standard, non-four-wheel drive motor vehicles. *See* Def.Ex. E, at 8; Tr. at 1047-51.



Furthermore, the existing jeep trail should not preclude evaluation pursuant to NEPA of the Blue Creek, Eightmile, and Siskiyou roadless areas as a potential single wilderness area. The three areas are contiguous and constitute a single wilderness area for recreational and environmental purposes (Tr. at 1035-36, 1058-59). Moreover, in time the existing trail will become overgrown with vegetation (Tr. at 1306). The separation of these roadless areas for evaluation as potential wilderness artificially lowered the wilderness "ratings" given these areas by the Forest Service in the FES, and thus reduced the likelihood that the Forest Service would recommend the Blue Creek roadless area for preservation as wilderness (Tr. at 1036-47). This bias against preservation of the Blue Creek Unit as wilderness renders the FES inadequate under NEPA.

The Forest Service's denial of plaintiffs' administrative appeal of this issue on the ground of "untimeliness" was in error. The fact that the Forest Service assumed that these areas were separated when it performed the Roadless Area Review and Evaluation (RARE I) does not estop plaintiffs from challenging the adequacy of the FES on this ground. Over five years ago the Forest Service itself rejected the contention that the existence of a primitive road precludes designation of surrounding lands as a single roadless and wilderness area. See Def.Ex. RR. Under these circumstances, NEPA and the Wilderness Act require that the Forest Service properly assess the impact of the Management Plan on the suitability of the Blue Creek, Eightmile, and Siskiyou roadless areas for designation as a single wilderness area.<sup>15</sup> See *Parker v. United States*, 309

<sup>15</sup> The FEIS for the Chimney Rock Section of the G-O road similarly fails properly to evaluate the impact of that action on potential wilderness resources, see Def.Ex. G, at 50-51, and is therefore invalid under NEPA.

F.Supp. 593, 602 (D.Colo.1970), *aff'd*, 448 F.2d 793 (10th Cir.1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1252, 31 L.Ed.2d 455 (1972).

#### IV. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, as amended, requires that "[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal \* \* \* undertaking \* \* \* shall, prior to the approval of the expenditure of any Federal funds on the undertaking \* \* \*, take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic preservation \* \* \* a reasonable opportunity to comment with regard to such undertaking.

The Helkau District, which consists of 13,500 acres located in the high country, was placed on the National Register of Historic Place. in 1981. Prior to 1981, the high country was eligible for inclusion on the National Register. Accordingly, the Forest Service afforded the Advisory Council the opportunity to comment on the Blue Creek DES and FES. See Def.Ex. GG-1 & GG-2. Plaintiffs asserted that the 1981 Management Plan constitutes a separate proposed "undertaking" that the Forest Service was required to submit to the Advisory Council for comment.

The Management Plan modifies Alternative E of the FES by increasing the size of the proposed "Indian Cultural Areas," increasing the size of the proposed "Stream Channel Protection" zones, and correspondingly decreasing the amount of timber to be harvested from the Blue Creek Unit. The Management Plan does not otherwise alter the recommendations of the FES, and hence simply refines a proposal "previously considered [by the Advisory Council] under Section 106 [of the NHPA]."

36 C.F.R. § 800.2(c) (1981). The modifications the Management Plan does propose would lessen its adverse impact on the Helkau District. Under these circumstances, requiring additional comment by the Advisory Council would serve no purpose and is not required by the NHPA.

#### V. Federal Water Pollution Control Act

Plaintiffs contend that construction of the Chimney Rock Section and/or implementation of the Management Plan would increase sedimentation in Blue Creek in violation of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.* The FWPCA requires each state to implement its own water quality standards. 33 U.S.C. § 1313; *see Natural Resources Defense Coun. v. Costle*, 564 F.2d 573, 575-76 (D.C.Cir.1977). Federal agencies must comply with those standards. 33 U.S.C. § 1323. In California, water quality standards are determined by Regional Water Quality Control Boards. Cal.Water Code §§ 13170, 13240-41 (1982). Those standards governing water quality in Blue Creek are set forth in the North Coast Regional Water Quality Control Board's "Water Quality Control Plan for Klamath River Basin 1-A" (1982) (the Water Quality Control Plan).

The Water Quality Control Plan establishes several "water quality objectives" deemed "of particular importance in protecting beneficial uses from unreasonable effect due to discharges from logging, construction, or associated activities \* \* \* \*". Water Quality Control Plan, at 57. These "water quality objectives" are "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water \* \* \* \*". *Id.* at 58. Two of these standards are relevant to the present case. First, the Water Quality Control Plan provides that "[t]urbidity shall not be increased more than 20 percent above naturally occurring

background levels."<sup>16</sup> *Id.* at 57. Second, it requires that "[t]he suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses." *Id.*

Construction of the Chimney Rock Section and/or implementation of the Management Plan would violate both of these water quality standards. Construction of the road would increase sediment levels in Blue Creek far in excess of the ceiling of 20% above background levels established by the Water Quality Control Plan (Tr. at 444). Further, this increase would adversely affect fish spawning habitat in Blue Creek, thereby reducing anadromous fish production in the Klamath River system (Tr. at 942-44, 948).<sup>17</sup> Similarly, implementation of the Management Plan would result in a large increase in sediment levels in Blue Creek in violation of state water quality standards<sup>18</sup> (Tr. at 494-95, 804). This increase in sediment would also reduce the sur-

<sup>16</sup> "Turbidity" refers to the opaqueness of water, *see*, Def.Ex. G, at 112, and is directly correlated with suspended sediment, Def.Ex. C, at 194 n. 1.

<sup>17</sup> Anadromous fish species bury their eggs under a shallow layer of gravel. If sufficient levels of suspended sediment then settle over the spawning gravel, the eggs are deprived of oxygen and, even if they survive and hatch, the young fish may be unable to emerge from under this layer of sediment. *See* Tr. at 937-40. Once the level of tolerance of the fish for such sediment is reached, a 1% increase in sediment may reduce fish emergence by as much as 4%. Tr. at 943-44.

<sup>18</sup> The Blue Creek FES estimates that the Management Plan would result in an "average" increase in sediment in Blue Creek of 10% over the first 10 years and 7% over the first 80 years. Def.Ex. C, at 194-95. The evidence does not support these estimates. *See* Tr. at 494-95, 804. Even if it did, an average increase in sediment over such long periods of time assures neither that state water quality standards will be obeyed nor that fish habitat will be safeguarded. *See* Tr. at 494.



vival rate of anadromous fish eggs laid in the spawning gravels of Blue Creek (Tr. at 976). Consequently, either proposed project would violate the FWPCA.

#### VI. Indian Reserved Water and Fishing Rights

Plaintiffs assert that construction of the Chimney Rock Section and/or implementation of the Management Plan would violate water and anadromous fishing rights reserved to Indians on the Hoopa Valley Indian Reservation (Hoopa Reservation) when that reservation was established. They also claim that such construction would violate defendants' duty, as trustees for the Indians, to protect those rights. Spawning gravels in Blue Creek provide a significant portion of the anadromous fish production of the Klamath River (Tr. at 879-81). Thus, the adverse impact of either project on water quality and fish habitat in Blue Creek (*see* Part V, *supra*) would significantly decrease the quantity of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Reservation. *See United States v. State of Washington*, 506 F.Supp. 187, 208 (W.D. Wash.1980), *modified*, 694 F.2d 1374 (9th Cir.1982); *id.*, 694 F.2d at 1383-84; *see also* 25 C.F.R. Part 250 (1982) (regulating exercise of fishing rights by Indians on Hoopa Reservation). This violation in turn constitutes a breach of defendants' trust responsibility towards those Indians. *See, e.g., Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C.1973).

#### VII. Administrative Procedure Act

Plaintiffs contend that defendants violated the standards governing administrative agency action contained in the Administrative Procedure Act (APA), 5 U.S.C. § 706. The violations of NEPA, the Wilderness Act, the FWPCA, Indian water and fishing rights, and plaintiffs'

First Amendment rights detailed above also constitute violations of the APA. *See* 5 U.S.C. §§ 706(2)(A), (B), & (D). The Court finds no additional violations of that Act. The "arbitrary and capricious" standard of review is a narrow one. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The Forest Service decisions under review were based upon consideration of the relevant factors, and hence were not arbitrary and capricious. *Id.*

#### VIII. Multiple Use, Sustained Yield Act

Plaintiffs argue that the proposed Chimney Rock Section and Management Plan violate the Multiple-Use, Sustained-Yield Act, 16 U.S.C. §§ 528-31. That Act declares a national policy to manage national forest lands for multiple uses without impairing the long-term productivity of those lands. 16 U.S.C. § 531. In the present case, the Forest Service attempted to balance various competing uses for the Blue Creek Unit. This consideration for multiple uses satisfies the requirements of the Multiple Use, Sustained Yield Act. *See Sierra Club v. Hardin*, 325 F.Supp. 99, 123-24 (D.Alaska 1971).

#### IX. National Forest Management Act of 1976

Plaintiffs contend that the proposed Forest Service actions would violate the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-14. Like the Multiple Use, Sustained Yield Act, the NFMA requires that national forest lands be managed with due consideration given to environmental values. *See* 36 C.F.R. Part 219 (1982). Here, the balance of competing values struck by the Forest Service in proposing to construct the Chimney Rock Section and implement the Management Plan was not so insensitive to environmental concerns that it violates the NFMA.



In light of all the foregoing,

**IT IS HEREBY ORDERED** that defendants are permanently enjoined from constructing the Chimney Rock Section of the G-O road and/or any alternative route for that Section which would traverse the high country, which high country constitutes the following land sections in Six Rivers National Forest:

T 14 N, R 3 E, sections 35, 36;

T 14 N, R 4 E, sections 21, 22, 23, 26, 27, 28, 29, 31, 32, 33, 34, 35;

T 13 N, R 4 E, sections 2, 3, 4, 5, 6, 7, 8; and

T 13 N, R 3 E, sections 1, 2, 11, 12, 13, 14.

**IT IS FURTHER HEREBY ORDERED** that defendants are permanently enjoined from engaging in commercial timber harvesting and/or from constructing any logging roads in the high country, as described above, pursuant to the 1981 Implementation Plan (Def.Ex. J) or any other land management plan.

**IT IS FURTHER HEREBY ORDERED** that defendants are permanently enjoined from engaging in commercial timber harvesting or the construction of logging roads in the 31,100 acre Blue Creek Roadless Area unless and until defendants prepare and circulate for public comment a supplemental environmental impact statement, or a new environmental impact statement, for the Blue Creek Management Plan, which adequately evaluates the wilderness resource potential of that Area as part of the contiguous Blue Creek, Eightmile, and Siskiyou Roadless Area.

**IT IS FURTHER HEREBY ORDERED** that defendants are permanently enjoined from engaging in commercial timber harvesting and/or from constructing any logging roads in any part of the Blue Creek Unit of Six

Rivers National Forest unless and until defendants have done the following:

(a) Prepared and circulated for public comment a supplemental environmental impact statement, or a new environmental impact statement, for the proposed Blue Creek Management Plan, which adequately specifies effective measures to mitigate the adverse impact of proposed logging activities on water quality and fish habitat in Blue Creek; and

(b) Completed and made available to all interested parties studies demonstrating that proposed logging activities (1) would not violate the Federal Water Pollution Control Act, and (2) would not reduce the supply of anadromous fish present in those portions of the Klamath River that flow through the Hoopa Valley Indian Reservation.

## APPENDIX D

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT CALIFORNIA

Nos. C-82-4049 SAW, C-82-5943 SAW.

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, A NON-PROFIT CORPORATION; JIMMIE JAMES; SAM JONES; LOWANA BRANTNER; CHRISTOPHER H. PETERS; SIERRA CLUB, A NON-PROFIT CORPORATION; THE WILDERNESS SOCIETY, A NON-PROFIT CORPORATION; CALIFORNIA TROUT, A NON-PROFIT CORPORATION; SISKIYOU MOUNTAINS RESOURCE COUNCIL, AN UNINCORPORATED ASSOCIATION; REDWOOD REGION AUDUBON SOCIETY, AN UNINCORPORATED ASSOCIATION; NORTHCOAST ENVIRONMENTAL CENTER, AN UNINCORPORATED ASSOCIATION; ENVIRONMENTAL CENTER, A NON-PROFIT CORPORATION; TIMOTHY MCKAY; AND JOHN AMODIO; PLAINTIFFS,

v.

R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF, UNITED STATES FOREST SERVICE; JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; AND UNITED STATES OF AMERICA; DEFENDANTS.

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE NATIVE AMERICAN HERITAGE COMMISSION, AND THE RESOURCES AGENCY, PLAINTIFF,

v.

JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; ZANE G. SMITH, JR., IN HIS OFFICIAL CAPACITY AS REGIONAL FORESTER OF THE CALIFORNIA REGION OF THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANTS.

Dec. 17, 1982

ORDER DENYING MOTIONS FOR A  
PRELIMINARY INJUNCTION

WEIGEL, District Judge.

These two related suits challenged decisions by the United States Forest Service (1) to complete construction of the last six miles (Chimney Rock Section) of a paved road from Gasquet, California, to Orleans, California (the "G-O road")<sup>1</sup> and (2) to adopt a forest management plan which would permit the harvesting of timber in the "Blue Creek Unit" ("Blue Creek") of Six Rivers National Forest.

The complaints in the two suits allege virtually identical causes of action. The plaintiffs in both allege that the challenged decisions violate: (1) the First Amendment of the Constitution of the United States; (2) the American Indian Freedom of Religion Act of 1978, 42 U.S.C. § 1996; (3) the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; (4) the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; (5) the Federal Water Quality Control Act, 33 U.S.C. § 1251 *et seq.*; as well as the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*; (6) fishing and water rights reserved to American Indians on the Hoopa Valley Indian Reservation; (7) defendants' trust responsibility towards the rights of American Indians; (8) the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (9) the Administrative Procedure Act, 5 U.S.C. § 706; (10) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*; and (11) the Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-31. Plaintiffs move for a preliminary injunction to prevent construction of the Chimney Rock Section of the G-O road.

<sup>1</sup> Paving of the Chimney Rock Section would close an unpaved gap in the G-O road which runs for a total of some 75 miles. The G-O road travels through Six Rivers National Forest.



Plaintiffs in *Northwest Indian Cemetery Protective Association, et al. v. Peterson, et al.*, C-82-4049 SAW, are seven non-profit corporations and unincorporated associations, Northwest Indian Cemetery Protective Association, Sierra Club, The Wilderness Society, California Trout, Siskiyou Mountains Resource Council, Redwood Region Audubon Society, and Northcoast Environmental Center, four individual plaintiffs of American Indian heritage (Jimmie James, Sam Jones, Lowana Brantner, and Christopher H. Peters), and two Sierra Club members (Timothy McKay and John Amadio). Defendants in that case are R. Max Peterson, Chief, U.S. Forest Service, and John R. Bock, Secretary of the Department of Agriculture. The State of California, acting through its Native American Heritage Commission and Resources Agency, is the sole plaintiff in *California v. Block, et al.*, C-82-5943 SAW. Defendants in this case are Secretary of Agriculture Block, Forest Service Chief Peterson, and Zane G. Smith, Jr., Regional Forester of the California Region of the Forest Service.

In order to obtain a preliminary injunction, plaintiffs must show either probable success on the merits and the possibility of irreparable injury or that serious questions regarding the merits are raised and the balance of hardship tips sharply in their favor. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). The Court has concluded, for reasons now to be stated, that the plaintiffs have not clearly met either of these standards and that the equities call for an early trial rather than granting the motion for preliminary injunctive relief.

#### 1. *Re First Amendment Claims.*

Plaintiffs contend that construction of the Chimney Rock Section will violate the rights of the Indian plaintiffs to practice their religion. Specifically, plaintiffs assert that

the Chimney Rock area is sacred "high country" to the Yurok, Karok, and Tolowa Indians, who use the area for religious rites and for the training of "medicinal and spiritual practitioners who serve these [Indian] communities." The construction of the road, they argue, and the accompanying disruptive intrusions such as logging activity and increased road traffic, are "totally incompatible with the ritual uses of this sacred country." Plaintiffs submit numerous affidavits, as well as archeological and ethnographic studies commissioned by the Forest Service, to support their claim that this "sacred region" is at "the very core of Northwest [Indian] religious beliefs and practices."

The First Amendment, of course, protects unorthodox as well as orthodox religious belief and practice. *Thomas v. Review Bd. of the Indian Employment Security Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981); *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975). Furthermore, the fact that the asserted religious activity occurs on public land does not necessarily defeat plaintiffs' claim. *See Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159, 1164 (6th Cir. 1980). The government must manage its property in a manner that does not needlessly impair the ability of its citizens to exercise their religious freedom. *See Badoni, supra*, at 176, 179 (government must not deny exercise of First Amendment rights compatible with public use of public property).

The proposed completion of the G-O road does not, however, unlawfully burden the Indian plaintiffs' exercise of their religion. Although the government must allow them reasonable access to public lands in order to follow their religious practices, defendants are not obligated to control or limit public access to public lands in order to facilitate those practices. Thus, the use by a relatively few persons of public lands for religious purposes does not release the government from its statutory responsibility to



manage such lands for the benefit of the public at large. See *Badoni, supra*, at 179; *Sequoyah, supra*, at 1164-65; *Crow v. Gullet*, 541 F.Supp. 785, 791-92 (D.S.D. 1982); *Hopi Indian Tribe v. Block*, 8 I.L.R. 3073, 3074-75 (D.D.C. 1981). Since the proposed construction imposes no unlawful burden on the Indian plaintiffs' religious freedom, the Court need not determine whether defendants assert an "overriding interest." See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972); *Badoni, supra*, at 176-77.

## 2. *Re American Indian Religious Freedom Act of 1978.*

Plaintiffs assert that the proposed completion of the G-O road violates their rights under the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996. That Act requires federal agencies to "evaluate their policies and procedures with the aim of protecting Indian religious freedoms." *Hopi, supra*, at 3076. On the present record, it appears that defendants have complied with this mandate. They commissioned studies on Indian religious beliefs and practices. On the basis of those studies, they selected a route for the Chimney Rock Section which minimized the adverse visual and audible impact on Chimney Rock itself which some Indians consider a religious site and use for religious practices. See Final Environmental Impact Statement, Gasquet-Orleans Road (Chimney Rock Section) (March 1982), at 52-53. Hence, based on the record and the declarations submitted by both parties, defendants appear to have complied with the requirements of the Act.

## 3. *Re National Environmental Policy Act.*

Plaintiffs also claim that the Final Environmental Impact Statement ("EIS") evaluating the Chimney Rock Section of the G-O road was in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et*

*seq.* Plaintiffs assert the EIS (1) inadequately discussed the impacts of the proposed road, and (2) inadequately discussed alternatives.

The appropriate standard for review of the adequacy of an EIS is well established in this circuit:

Whether an EIS will be found in compliance with NEPA involves an evaluation of whether the discussion of environmental impacts "reasonably set[s] forth sufficient information to enable the decision-maker to consider the environmental factors and make a reasoned decision."

*Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (citations omitted). Under this standard, plaintiffs' claim is unlikely to succeed on the merits. Defendants undertook extensive analysis of the geological, cultural, and religious impacts of the proposed road. The EIS they prepared includes appendices devoted exclusively to the geological considerations involved in construction (Appendix A) and to the cultural resources affected (Appendix K). Furthermore, defendants submit declarations of Forest Service personnel detailing the thorough investigations conducted in preparing the geological appendix and establishing the low incident of road failure due to landslides on existing portions of the G-O road. See Declaration of Richard L. Farrington; Declaration of Robert S. Black, ¶¶ 12-16. Although plaintiffs submit declarations of their own experts challenging the conclusions of the EIS, "disagreement among experts will not serve to invalidate an EIS." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973). Thus, the EIS, based upon the record now before the Court, appears adequately to consider the environmental impact of the proposed road.<sup>2</sup>

<sup>2</sup> Plaintiffs also claim that the EIS fails to consider the cumulative impact of the proposed road and the proposed forest management plan in violation of 40 C.F.R. § 1500.6(a) (1977). Assuming the EIS

The EIS also appears adequately to consider alternatives to the proposed road. It analyzes ten different possible routes, as well as the option of not constructing the road. See EIS, at 67-71. Plaintiffs do not propose any alternatives neglected by the EIS, see *Coalition For Canyon Preservation v. Bowers*, 632 F.2d 774, 783-84 (9th Cir. 1980). They simply assert that the EIS treats the alternatives in a "biased" manner. The record now before the Court does not support the granting of a preliminary injunction on this claim.

#### 4. *Re National Historic Preservation Act.*

Plaintiffs assert that defendants did not allow the Advisory Council on Historic Preservation ("ACHP") a "reasonable opportunity to comment" on the proposed road, thereby violating Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. The present record does not support that claim.

Defendants received and considered the comment of the ACHP (Declaration of Kenneth L. Wilson, ¶¶ 10-14). They provided the ACHP with two reports on the effects of the proposed construction on cultural resources, an onsite inspection, and defendants held a Public Information Meeting at the ACHP's request. *Id.* Plaintiffs have not shown that the ACHP was denied a reasonable opportunity to comment nor that defendants dealt with the ACHP in bad faith. See *Nashvillians Against I-440 v. Lewis*, 524 F.Supp. 962, 979 (M.D. Tenn. 1981). The record now before the Court does not justify concluding that defendants have failed to comply with the National Historic Preservation Act.

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fails to do so, plaintiffs have not shown that as a matter of law this claim either is likely to succeed on the merits or raises "serious questions" concerning the merits.

#### 5. *Re Federal and State Water Pollution Statutes.*

Plaintiffs contend that the proposed completion of the G-O road would degrade water quality in the surrounding area in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the California Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 *et seq.*

Plaintiffs appear unlikely to succeed on the merits of this claim. Water quality degradation similar to that plaintiffs assert to be the likely consequence of completing the G-O road has not resulted from construction of the existing 69 mile paved portions of the G-O road. See Declaration of Christopher Knopp, ¶ 7. Furthermore, water quality degradation appears unlikely to result from the proposed construction because of the numerous measures provided for by defendants to control the erosive force of rainfall and surface runoff. *Id.*

#### 6. *Re Reserved Fishing and Water Rights.*

Plaintiffs assert that construction of the Chimney Rock Section will violate the water and anadromous fishing rights reserved to the Indians when the federal government established the Hoopa Valley Indian Reservation. The adverse impact of the construction on water quality and fishing resources in Blue Creek, they argue, will deprive the Indians on the Hoopa Reservation of these rights.

Assuming that water and fishing rights were reserved to the Indians on the Hoopa Valley Indian Reservation when that reservation was created, to succeed on this claim plaintiffs must establish that the proposed construction "will proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired \* \* \* \*". *United States v. State of Washington*, 506 F.Supp. 187, 208 (W.D. Wash. 1980). On the present record, plaintiffs have not satisfied this



burden. The anadromous fish habitat (salmon and steelhead) on Blue Creek begins 7.5 miles downstream from the proposed crossing of the creek by the G-O road. Declaration of Jerry A. Barnes. ¶ 8. Such fish cannot travel further upstream than 7.5 miles from the road to spawn because of natural barriers, including a waterfall. *Id.* Furthermore, because only a small proportion of the proposed road will be in close proximity to streams, even if landslides occur along the road, it appears unlikely that they would affect the anadromous fish habitat miles downstream. *Id.* ¶¶ 9-15.

#### 7. *Re Defendants' Trust Responsibility.*

Plaintiffs also assert that the harmful impact of the proposed construction on Indian water and fishing rights is a breach of defendants' duty to protect those rights as trustees of the Indians affected by the proposed construction. Officials of the United States are charged with the duties of the trustee when dealing with American Indians. *See e.g. Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1973).

This trust will be violated only if completion of the proposed road will adversely affect the Indians' water and fishing rights. For the reasons already stated, plaintiffs have not made such a showing on the present record. *See* Declaration of Christopher Knopp, *supra*; Declaration of Jerry A. Barnes, *supra*.

#### 8. *Re Wilderness Act.*

Plaintiffs allege that defendants, in violation of the Wilderness Act (16 U.S.C. § 1132(b)), failed to consider the wilderness value of the Blue Creek Unit as part of a larger potential wilderness area including roadless and undeveloped lands contiguous to Blue Creek. Section 1132(b) provides that "[t]he Secretary of Agriculture shall

\*\*\* review \*\*\* for preservation as wilderness, each area in the national forests classified \*\*\* as 'primitive' and report his findings to the President." Plaintiffs contend that "area" within the meaning of this section means the total contiguous, undeveloped area of which Blue Creek is one part, rather than the Blue Creek Unit alone.

Plaintiffs do not appear likely to prevail on this claim at trial. Completion of the final six mile segment of the G-O road would not sever Blue Creek from other proposed wilderness areas since the existing paved sections of the G-O road already separate Blue Creek from these areas. Hence, defendants need not have considered Blue Creek as part of a larger undeveloped area when complying with the requirements of the Wilderness Act.

#### 9. *Re Administrative Procedure Act.*

Plaintiffs allege that defendants violated the standards governing administrative agency actions contained in the Administrative Procedure Act, 5 U.S.C. § 706(2). The Court finds no such violation on the present record.

The "arbitrary and capricious" standard of review is a narrow one. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). If agency action was based on a consideration of the relevant factors, then it must be upheld under this standard. *Id.*

Nothing in the record indicates that defendants based their decision to complete construction of the G-O road on anything other than the merits of the case. On the contrary, defendants have gone to great lengths to gather information on Indian religious beliefs and practices, and selected a route for the road that has less adverse impact on those practices than did several proposed alternatives. In sum, plaintiffs have not now made a showing of bias or



prejudice sufficient to justify issuance of a preliminary injunction on the basis of alleged violation of the Administrative Procedure Act.

**10. *Re Additional Claims.***

Plaintiffs also assert in their complaints that defendants have violated the National Forest Management Act, 16 U.S.C. §§ 1600-14, and the Multiple Use, Sustained Yield Act, 16 U.S.C. § 528-31. However, they do not argue that these claims support their motions for a preliminary injunction.

Accordingly,

**IT IS HEREBY ORDERED** that the motions of plaintiffs in the above-captioned actions for a preliminary injunction are denied.

# **OPPOSITION BRIEF**

FEB 25 1987

JOSEPH F. SPANIOL, JR.  
CLERK

No. 86-1013

**In The  
Supreme Court of the United States**  
October Term, 1986

— o —  
**RICHARD E. LYG,**  
**SECRETARY OF AGRICULTURE, ET AL.,**  
*Petitioners,*

v.

**NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.**

— o —  
**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

— o —  
**BRIEF FOR THE  
INDIAN RESPONDENTS IN OPPOSITION**

— o —  
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**QUESTION PRESENTED**

Whether the construction of a six mile section of road through an area of land on the Six Rivers National Forest and the logging of that same area violates the First Amendment rights of Indians to freely exercise their religion when the Indians have shown that the area is central and indispensable to their religious practices and that the proposed actions would seriously interfere with or impair those religious practices and the government has failed to show an overriding governmental interest.

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THE NINTH CIRCUIT**

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**BRIEF FOR THE  
INDIAN RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 795 F.2d 688. The prior opinion of the court of appeals (Pet. App. 38a-52a) is reported at 764 F.2d 581. The decision of the district court (Pet. App. 53a-91a) is reported at 565 F.Supp. 586.

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## JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986. Justice O'Connor extended the time for filing a petition for writ of certiorari to December 19, 1986. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

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## STATEMENT

1. The Six Rivers National Forest, which was created in 1947, encompasses approximately 956,000 acres of generally rugged mountainous terrain in northwestern California. The Blue Creek Unit consists of 67,500 acres located within the Six Rivers National Forest. (Pet. App. 54a).

Since at least the early nineteenth century, Yurok, Karok and Tolowa Indians have traveled to a remote undeveloped area within the northeastern corner of the Blue Creek Unit to communicate with the Creator, to perform rituals, and to prepare for specific religious and medicinal ceremonies. (Pet. App. 3a, 8a, 57a-58a, 64a). This area, known as the "high country," is considered sacred and constitutes the center of the spiritual world for these tribes; no other geographic areas or sites hold equivalent religious significance. (Ibid.).

Prior to its decision to log the Blue Creek Unit, the Forest Service managed the area essentially as wilderness.<sup>1</sup> That is, the area was managed in a natural condi-

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1. Approximately 31,000 acres of the Blue Creek Unit is undeveloped and roadless. (Pet. App. 3a).

tion in order to protect fish habitat, scenic values, and opportunities for primitive recreational experiences.

In 1975, the Forest Service released a final environmental impact statement (EIS) concerning future land use plans for the Blue Creek Unit. (Pet. App. 4a, 55a). In 1981, the Regional Forester selected a land use plan which called for the harvesting of 733 million board feet of timber from the Blue Creek Unit, including the high country. (Ibid.).

During this same time period, the Forest Service issued a draft EIS proposing construction of a 6 mile section of road through the high country to connect two existing sections of road from the towns of Gasquet, California to Orleans, California. (Ibid.).<sup>2</sup>

Prior to issuing a final EIS on the road construction, the Forest Service commissioned a comprehensive ethnographic, historical, and archaeological study of the area that would be impacted by the proposed road. (Pet. App. 10a). The Forest Service study found that construction of the road through the high country would result in an irreparable impact upon the religious area and the religious practices associated with the area (Pet. App. 8a, 65a), and

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2. The proposed road project is not as petitioner states (Pet. 3) an upgrading or paving of an existing road, but rather, the proposed road is an entirely new paved, high-standard road built in a different location from the existing dirt jeep trail that currently connects the existing sections of road from Gasquet and Orleans. (Pet. App. 82a-83a).

therefore recommended against construction of the road through the high country.<sup>3</sup>

In 1981, the greater portion of the high country was placed on the National Register of Historic Places as the 13,500 acre Helkau District pursuant to the National Historic Preservation Act, 16 U.S.C. 470a. (Pet. App. 85a).

In January 1982, the Advisory Council on Historic Preservation issued its recommendation that the proposed road not be constructed. (Letter from Advisory Council on Historic Preservation to Secretary of Agriculture, Jan. 29, 1982, at 2). The Advisory Council concluded that the road would have "devastating effects on a historic property of great cultural value to the native people of the area." (Ibid.).

On March 2, 1982, however, the Forest Service issued a final EIS on the road project and selected a construction route which bisected the religious use area. (Pet. App. 4a, 59a).

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3. The Theodoratus Study was commissioned by the Forest Service expressly to provide definitive information on the impacts of construction of the proposed road section upon the Indian religious practices associated with the area. The study team consisted, in addition to Dr. Dorothea Theodoratus and Dr. Joseph Chartkoff, of twenty members who spent a year reviewing all previous studies and other literature, conducting field investigations, and conducting interviews of 166 Yurok, Karok and Tolowa Indians of the area. (Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest at 4, 7-9). Dr. Joseph Winter, Forest Archeologist for the Six Rivers National Forest, evaluated the Theodoratus Study and found it to be a sound and professional analysis of high methodological quality; and he concurred with the conclusions of the report. (Review of "Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest" at 70-71).

2. After exhaustion of administrative remedies, two suits were filed challenging the Forest Service decisions to implement the Blue Creek land use plan and construct the road section through the high country: *California v. Block, et al.*, brought by the State of California, and *Northwest Indian Cemetery Protective Association, et al. v. Petersen, et al.*, brought by an Indian cultural and religious organization, several conservation organizations and six individuals, including Indian religious practitioners.

After a ten-day trial, the district court held that the Forest Service decisions violated the First Amendment, the National Environmental Policy Act and the Wilderness Act, the Federal Water Pollution Control Act, water and fishing rights reserved to the Indians of the Hoopa Valley Indian Reservation and defendants' trust responsibility towards those rights, and the Administrative Procedure Act.<sup>4</sup> (Pet. App. 56a).

In its comprehensive findings of fact, the district court found that "[t]he evidence establishes that construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indian plaintiffs' use of the high country for religious practices." (Pet. App. 63a).

The district court specifically found that the religious use of the high country is "central and indispensable" to

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4. Other claims alleged were the American Indian Freedom of Religion Act of 1978, 42 U.S.C. 1996; the Multiple Use Sustained-Yield Act, 16 U.S.C. 528-31; the National Forest Management Act of 1976, 16 U.S.C. 1600 et seq. (Pet. App. 4a-5a).

the Indians' religion,<sup>5</sup> and that the proposed construction and logging of the high country would seriously impair the Indians' religious use of the area. (Pet. App. 63a, 64a, 65a). In finding that the proposed actions would seriously interfere with the religious practices, the district court noted that the Forest Service's own study had concluded that the proposed intrusions are "potentially destructive of the very core of Northwest [Indian] religious beliefs and practices." (Id. at 65a).

The district court next carefully examined the interests the Forest Service asserted would be served by the construction of the road section through the high country and found that those interests would either not be served by the proposed project or fell far short of constituting the paramount interests necessary to justify infringement of the Indians' freedom of religion. (Pet. App. 66a-68a).<sup>6</sup>

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5. The district court found that no other geographic area holds equivalent religious significance to these tribes; that use of the high country is essential to performing major religious ceremonies which constitute the heart of the Northwest Indian religious belief system; that use of the high country for training young tribal members is necessary to preserve the Indians' traditional religious beliefs and ceremonies. (Pet. App. 64a).

6. The trial court made the following pertinent factual findings: construction of the road section would not improve access to the timber resources in the Blue Creek Unit, which could already be harvested without construction of the proposed section of the road; no net increase in the number of jobs in the regional timber industry would result; recreational access to the area currently exists; resulting environmental degradation would decrease the area's suitability for primitive recreational use; construction of the road would not greatly improve administration of the forest; and past investment in the existing sections of the road did not justify construction of the Chimney Rock section since those sections presently provide improved and useful access to a vast region. (Pet. App. 66a-68a).

The district court also found that the Forest Service had not shown a compelling interest in harvesting the timber in the high country,<sup>7</sup> nor was the management land use plan the least restrictive alternative for harvesting the timber in the Blue Creek Unit. (Pet. App. 68a-69a).

In addition to the First Amendment violation, the district court found that the environmental impact statements on the road construction and the land use management plan failed to satisfy the requirements of the National Environmental Policy Act and the Wilderness Act. (Pet. App. 71a-85a). Because the proposed projects would result in an unacceptable increase in sediment levels in Blue Creek and adversely affect fish spawning habitat, the district court also found a violation of the Federal Water Pollution Control Act and Indian fishing rights. (Id. at 86a-88a).<sup>8</sup> Accordingly, the district court enjoined the Forest Service from proceeding with its proposed actions.

3. While the case was pending before the court of appeals, Congress passed the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 *et seq.* The Act designated as part of the new Siskiyou Wilderness much of the Blue Creek Unit, including most of the high country.<sup>9</sup>

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7. In this regard, the district court found that the timber from the Blue Creek Unit is but a small fraction of the timber resources found in the entire Six Rivers National Forest, and that its harvesting would not significantly affect timber supplies or the regional timber industry. (Pet. App. 68a-69a).

8. Blue Creek provides a significant portion of the anadromous fish production of the Klamath River, which flows through the Hoopa Valley Indian Reservation. (Pet. App. 88a).

9. Wilderness designation prohibits commercial timber harvesting and other commercial enterprises, permanent roads, and other development. 16 U.S.C. 1133(c).



Congress permanently set aside this area as wilderness because it concluded that the area was "of critical importance to Native Americans for cultural and religious purposes," and that the area also was "highly suitable for year-round primitive recreation," and that the area's high fishery and wildlife values merited protection. H.R. Rep. 98-40, 98th Cong., 1st Sess. 32 (1983); S.Rep. 98-582, 98th Cong., 2d Sess. 28-29 (1984).

In leaving a 1,200 foot-wide corridor through the new Siskiyou Wilderness for possible construction of the Gasquet-Orleans road section, Congress expressly made clear that by doing so it was making no judgment on the merits of that project. (*Ibid.*).<sup>10</sup>

4. On July 22, 1986, the court of appeals, in a comprehensive opinion issued on rehearing,<sup>11</sup> affirmed the district court in all respects except the wilderness claim and the Indian fishing rights claim, which parts it vacated. (Pet. App. 1a-37a).<sup>12</sup>

10. The House Committee on Interior and Insular Affairs declared: "the Committee does not adopt any position with respect to the so-called 'G-O' (Gasquet-Orleans) road project . . . ." H.R. Rep. 98-40, *supra*, at 32.

11. The court of appeals initially issued a decision on June 25, 1985, affirming the district court decision in part and vacating in part. (Pet. App. 38a-52a). The Forest Service filed a petition for rehearing and suggestion for rehearing en banc. On July 22, 1986, the court of appeals granted the petition for rehearing, withdrew its previous opinion, and issued a new opinion. (Pet. App. 1a-37a).

12. The court of appeals found, as it had in its prior opinion, that the claim that the Forest Service should have evaluated the Blue Creek Unit together with two adjoining roadless areas for possible wilderness designation had been rendered moot by the California Wilderness Act. (Pet. App. 20a).

(Continued on next page)

With respect to the religious freedom issues, the court of appeals concluded that the Indians had shown that the proposed actions would interfere with their religious practices (Pet. App. 6a-11a), and that the Forest Service had not demonstrated a compelling interest to support the proposed projects. (*Id.* at 15a).

Noting that a showing that the high country is used for religious purposes and that the area is considered sacred would not be enough to characterize the proposed Forest Service actions as a burden on free exercise rights (Pet. App. 7a), the court of appeals endorsed a two-step inquiry. First, Indian plaintiffs must show that the geographic area at issue is indispensable and central to their religious practices and that the proposed governmental actions would seriously interfere with or impair those religious practices. (*Id.* at 7a, 14a). Second, if that burden is met, then the government must show an overriding governmental interest for the proposed actions. (*Id.* at 6a-7a, 13a-15a).

Applying this analysis to this case, the court found that the record amply supported the conclusion that the high country is indispensable and central to the Indians' religious practices (Pet. App. 9a), and that the proposed projects would seriously interfere with the Indians' religious practices. (*Id.* at 9a-10a). The court of appeals also agreed with the district court's finding that the government had failed to demonstrate a compelling governmental interest to support its proposed projects. (*Id.* at 14a-15a).

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The court of appeals also concluded that this case was not an appropriate vehicle in which to rule on the Hoopa Valley Indian Reservation fishing rights claim. (Pet. App. 19a-20a n.10).

The court of appeals also upheld the district court's findings that the environmental impact statements were inadequate under the National Environmental Policy Act (Pet. App. 15a-18a), and that the Forest Service projects would violate water quality standards. (Id. at 18a-19a).

One member of the appeal panel dissented with regard to the First Amendment. (Pet. App. 22a-37a). The dissenting opinion agreed that the applicable law to this case was the two-step analysis used by the majority (id. at 24a-25a), but went on to review the Forest Service study independently and concluded that the study did not support the issuance of an injunction. (Id. at 29a).

The petition for a writ of certiorari presents only the constitutional issue and does not challenge the statutory bases for the district court's injunction.

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### REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. Further review is not warranted.

1. As the court of appeals correctly observed (Pet. App. 14a-15a), the circuit courts that have considered similar Indian religious claims have employed a two-step analysis:

Those cases require the Indians first to show that the land in question is central and indispensable to the exercise of their religion and that the proposed governmental operations will interfere with that exercise; if that burden is met, then the government is required to

show that its operations serve a compelling interest. See *Wilson v. Block*, 708 F.2d at 742-44; *Sequoyah v. TVA*, 620 F.2d at 1164; *Badoni v. Higginson*, 638 F.2d at 176-77; *Crow v. Gullet*, 541 F.Supp. 792.

The dissenting opinion, citing the same cases as the majority and offered by petitioner as being in conflict, acknowledged that Indian religious claims such as those at issue here have been resolved through the adoption of the above two-step analysis. (Pet. App. 24a-25a).

This analysis was followed by the court of appeals here. (Pet. App. 6a-11a, 13a-15a). Petitioner's quarrel is not with the legal test applied by the court of appeals, but rather with the district and court of appeals' fact-bound conclusion that Indian respondents, unlike the claimants in the other circuit cases, carried their burden of proof on the first prong of the analysis, and that the Forest Service failed to carry its burden on the second prong. (Id. at 7a-11a, 13a-15a, 63a-69a). That issue, on which the court of appeals was correct, does not warrant this Court's review.<sup>13</sup>

In *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), the court found that the Indian plaintiffs had not proven that the area at issue was indispensable or central to their religious practice or that the government actions would seriously interfere with or impair religious practices that depended upon the area at issue. Id. at 742-44. The court in *Crow v. Gullet*, 706 F.2d

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13. This Court has frequently recognized that "how the facts are found will often dictate the decision of federal claims." *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 416 (1964); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues").

856 (8th Cir.), aff'g 541 F.Supp. 785 (D.S.D.), cert. denied, 464 U.S. 977 (1983), found that the Indians had not shown that the construction projects at issue interfered with their religious practices. 541 F.Supp. at 791-93.

In contrast, the district court here specifically found that use of the high country is central and indispensable to the Indian plaintiffs' religion (Pet. App. 8a-9a, 64a), and that "the proposed roadbuilding and logging operations would greatly impair religious exercises of plaintiff Indians in the only place where they can be performed." (Id. at 11a).<sup>14</sup>

In *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), the plaintiffs did not claim that the area threatened played a central role in the practice of their religion and in fact failed to show significant past or present use of the area for religious purposes. Id. at 1163-64. The record in this case, by contrast, establishes the critical and central role that the high country plays in the practice of Indian respondents' religion, and significant and continuing religious use of the area dating back generations. (Pet. App. 58a, 64a).

The factual conclusions supporting the court of appeals' decision do not require further review.

14. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), also is not inconsistent with the decision at hand. Endorsing the two-step analysis used by the court of appeals here, the *Badoni* court, finding that the project at issue was a crucial part of a multi-state water storage and power generation project and that no less restrictive means of serving that compelling interest existed, did not reach the issue of whether the complained of action burdened plaintiffs' free exercise of religion. (Id. at 177).

2. The court of appeals employed the two-step analysis for evaluating Free Exercise claims established by this Court. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1976); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The district court and court of appeals looked at "the quality of the claims" and correctly concluded that Indian respondents had demonstrated an infringement upon the free exercise of their religion. See *Wisconsin v. Yoder*, 406 U.S. at 215; *Sequoyah v. TVA*, 620 F.2d at 1165.<sup>15</sup>

Petitioner requests this Court to ignore the district court's factually-based conclusions (Pet. App. 66a-69a) that the specific interests to be served by the projects at issue would either not be materially served or fell "far short of constituting the 'paramount' interests necessary to justify infringement of Indian respondents' freedom of religion." (Id. at 67a). See *Sherbert v. Verner*, 374 U.S. at 406.

15. This Court has acknowledged, as did the court of appeals (Pet. App. 11a), that the Free Exercise Clause "prohibits misuse of secular governmental programs 'to impede the observance of one or all religions.'" *Gillette v. United States*, 401 U.S. 437, 462. This is so "even though the burden may be characterized as being only indirect." *Sherbert v. Verner*, 374 U.S. at 404 (quoting *Branfield v. Brown*, 366 U.S. 599, 607 (1961)).

Petitioner's factual contention that Indian respondents' religious exercise would only be "incidentally" burdened is belied by the findings of the district court. (Pet. App. 63a-65a). Indeed, the Forest Service's own experts concluded that the proposed projects were "potentially destructive of the very core of Northwest [Indian] religious beliefs and practices." (Id. at 65a).



Instead, petitioner asserts (Pet. 22) the sweeping claim that the Department of Agriculture's prerogative to manage the national forests within its statutory authority, in and of itself, constitutes a sufficient interest to override respondents' sincere (Pet. App. 62a) religious claims.

This Court has long held that generalized claims of governmental interest are not sufficient to override the constitutional guarantee of religious freedom, *Sherbert v. Verner*, 374 U.S. at 407; and that it is incumbent upon a court faced with a legitimate religious claim to "searchingly examine" the evidence regarding the government's interests and means. *Wisconsin v. Yoder*, 374 U.S. at 407. The district court and the court of appeals correctly concluded that the government had failed to show a compelling interest (*id.* at 215) or that its project represented the least restrictive means of achieving the government's interests. (Pet. App. 15a, 66a-69a).

*Bowen v. Roy*, — U.S. —, 106 S.Ct. 2147 (1986) does not dictate a different result. As the court of appeals noted, "the fact that the proposed government operations would virtually destroy plaintiff Indians' ability to practice their religion differentiates this case from *Bowen v. Roy*." (Pet. App. 10a). Not only would the proposed actions here "greatly impair religious exercises of the plaintiff Indians in the only place where they can be performed" (Pet. App. 11a), but the actions challenged here are not the kind of internal governmental practice at issue in *Bowen*. Indeed, as is evidenced by this very case, the government actions here are subject to outside scrutiny under numerous federal statutes.

Petitioner's implication that Congress intended the Forest Service to be given full reign to manage the national forest lands without further check, or without having to consider legitimate Indian religious claims (Pet. 25), is refuted by the enactment of the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996 (Pub. L. No. 95-341). Pursuant to the directives of Section 2 of Pub. L. No. 98-341, the Executive Branch itself determined and reported to Congress that in order to preserve Indian religious free exercise rights:

The accommodation of Native religious uses within federal land management programs must take into account their desire for these [sacred] lands to remain in their natural state.

. . .

Physical access to the land and its natural products must also include the preservation of the natural conditions which are the *sine qua non* of that access. The efficacy of the natural well-being of the sacred sites are dependent upon physical conditions.

Federal Agencies Task Force, American Indian Religious Freedom Act Report (1979) at 51, 54.<sup>16</sup>

16. As the court of appeals noted:

The government substantially overstates its case and argues far beyond the reach of the district court's injunction. The district court's order permanently enjoins the Forest Service only from completing the G-O Road and from engaging in commercial timber harvesting and constructing logging roads in the high country. 565 F.Supp. at 606. The Forest Service remains free to administer the high country for all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat and wilderness. See Multiple-Use Sustained-Yield Act, 16 U.S.C. § 1604(e)(1). (Pet. App. 12a).

The decision of the court of appeals is correct and in accord with all relevant precedent.

3. Respondents accept the proposition that federal courts should generally stay their hand at deciding constitutional issues if there are alternative grounds for disposition. However, as petitioner admits (Pet. 27-28), the remedy for the constitutional claim is distinctly different from the remedy for the NEPA and Federal Water Pollution Control Act claims (a permanent, unconditional injunction versus a conditional injunction). Because the nature of the injunctive relief is different, the case in fact does not present truly alternative grounds for disposition; the statutory grounds for the injunction are not dispositive of the Indian respondents' religious claims. The lower courts' determinations were not premature.

Despite petitioner's protestations to the contrary, (Pet. 27-28), petitioner's request for review by this Court is in the nature of a request for an advisory opinion. This Court should not pass upon the constitutional question because this Court's decision in fact may not have any impact upon the Forest Service's ability to proceed with the projects.<sup>17</sup> It is pure speculation, especially given the strength of the district court's findings on the water quality impacts (Pet. App. at 76a-77a, 86a-87a), that the projects will be able to satisfy state water quality

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17. Contrary to petitioner's assertion that the constitutional basis for the injunction prohibits it from reconsidering its logging plan for the Blue Creek Unit, the Forest Service is free to review its plan for the Blue Creek Unit, except that it cannot propose to log that corner of the Blue Creek Unit described as the high country.

standards and the requirements of the Water Pollution Control Act. Accordingly, review is not appropriate.<sup>18</sup>

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### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARILYN B. MILES  
STEPHEN V. QUESENBERRY  
California Indian Legal Services

February, 1987.

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18. "Simply" vacating the lower courts' constitutional determinations, to have them resurrected at a later date, would serve no purpose.

# **OPPOSITION BRIEF**



MAR 27 1987

JOSEPH F. SPANIOL, JR.  
CLERK

No. 86-1013

In The  
**Supreme Court of the United States**

October Term, 1986

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RICHARD E. LYG,  
SECRETARY OF AGRICULTURE, *et al.*,  
*Petitioners,*

v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**BRIEF FOR RESPONDENT STATE OF  
CALIFORNIA IN OPPOSITION**

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## QUESTION PRESENTED

Whether the construction of a six-mile section of road through an area of land on the Six Rivers National Forest and the logging of that same area violates the First Amendment rights of Indians to freely exercise their religion when the Indians have shown that the area is central and indispensable to their religious practices and that the proposed actions would seriously interfere with or impair those religious practices and the government has failed to show an overriding governmental interest.

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No. 86-1013

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In The  
**Supreme Court of the United States**  
October Term, 1986

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 795 F.2d 688. The prior opinion of the court of appeals (Pet. App. 38a-52a) is reported at 764 F.2d 581. The decision of the district court (Pet. App. 53a-91a) is reported at 565 F.Supp. 586.

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## JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986. Justice O'Conner extended the time for filing a petition for writ of certiorari to December 19, 1986. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

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## STATEMENT

The State of California appears by and through the Native American Heritage Commission, the State agency charged with protecting the right to practice Native American Religion on public land, including protection of ceremonial sites from irreparable damage. (Cal. Public Resources Code §§ 5097.9 et seq.) California concurs in the statement contained in the opposition brief filed herein by Indian Respondents, and therefore limits its statement to a focused discussion of the nature of the religious practices at issue here and the way in which the proposed road and timbering would interfere with those practices.<sup>1</sup>

The Yurok, Karok, and Tolowa Indian tribes live in the northwestern corner of California. These tribes share

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1. Since the California Wilderness Bill added most of the area (31,000 acres) at issue to the contiguous Siskiyou Wilderness, in consideration, in part, of its "critical importance to Native Americans for cultural and religious purposes," (H.R. Rep. 98-40, 98th Cong. 1st Sess. 32 (1983); S. Rep. 98-0582, 98th Cong., 2d Sess. 28-29 (1984), logging is no longer of primary interest to the Forest Service. The Wilderness Bill did, however, leave a corridor for possible construction of the road, without taking any position whether it should be built. (*Id.*) Therefore, this discussion will focus primarily on the impacts of the road.

the use of a very special religious area located in the southern portion of the Siskiyou Wilderness and referred to by the Indian people as the high country. The high country was placed there by the Great Creator as a place where Indian people could go to communicate with the creator and draw religious power. (Tr. 75, 228.)<sup>2</sup>

Religious power brought down from the high country by medicine persons is used in religious ceremonies held in the community down below (Tr. 109, 110), where 300 or 400 people attend. (Tr. 122.) Different ceremonies serve different religious purposes. The White Deerskin Dance and the Jump Dance, for example, are World Renewal dances whose purpose is the stabilization and preservation of the earth from catastrophe and of mankind from disease. (Tr. 112-113, Theo. 45-52.) Religious power is also brought down from the high country by healing doctors, who use the power in alleviating illness. (Theo. 50-58.) Finally, power may be sought in the high country by individuals for personal achievement and concerns (Theo. 58-62), for example, to restore health (Tr. 310-311), or when a warning is received from the Great Creator (Tr. 61-62). The religious community which depends upon the religious power drawn from the high country is about 4500. (Tr. 111-113.)

Specific sites within the high country are necessary to the training and on-going religious practice of individuals

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2. References to the record will be as follows: "Tr." is the reporter's transcript; "Theo." is the ethnographic report prepared for the Forest Service by Dr. Theodoratus; "DEIS" is the draft environmental impact statement, and "FEIS" is the final environmental impact statement. References are typically illustrative rather than comprehensive.

who use the area for personal medicine and growth, healing medicine, and medicine affecting the well-being of the religious community. These sites are necessary both as specific sites for specific medicines and as integrated parts of a system of religious practice which correlates ascending degrees of personal power with a geographic hierarchy of power. Individuals progressively use sites of increasing power as a necessary part of their training and growth in the religious practice. Experience at the lower levels is a prerequisite for attaining power at the higher levels. Successful use of the high country is dependent upon an undisturbed natural setting, silence, and privacy. (Theo. 105.)

The individual going to the high country usually prepares by a purification period of fasting and praying in order to attain sufficient power to enter. A successful journey into the high country must be preceded by signs that the spirits recognize the sincerity of the quest and sanction that quest. (Theo. 61.) The questor enters the high country at a walk or a run and along a particular trail according to the type of medicine to be made. Privacy is essential in the high country in order to maintain purity. (Theo. 63.)

The practices conducted in the high country entail meditation and achieving a perfect awareness of the natural environment. (DEIS 361-362; Theo. 51.) Prayer seats are oriented so there is an unobstructed view, and the eye and ear must be surrounded by undisturbed naturalness. (Theo. 40; Tr. 89-90.) The success of the quest depends on being able to enter a trance in which visions and phantasmic sounds may be received as signs from the spirits that the quest for power has been granted. (Tr. 231, 239, 315; Theo. 63; DEIS 361-363.) Intruding, non-natural

perceptions block the ability to enter into a trance and draw power. (Theo. 108.) The Forest Service has acknowledged in its answer to California's complaint that "the purity and integrity of the high country are the *sine qua non* of the ability to draw power for the well-being of the questor and the community." (Answer, para. 8, admitting allegations of sentence 1 of para. 8 of Complaint.)

The high country is on the steep southern slope of a major watershed, where ascending altitude is associated with ascending power. (Theo. 74.) Doctor Rock, Chimney Rock, and Peak 8 are among the most powerful places in the high country. Chimney Rock, an outcropping near the very top of the ridge, is a place of very great power, which is used mostly by men praying for accomplishment. The prayer seats there are oriented down the slope. (Theo. 86-87.) Peak 8, some two to three miles downslope, is the "center of the spiritual world" and is so powerful it can be used only after a man has achieved very high powers. (Theo. 87.) The Doctor Rock area, three to four miles below the ridgetop, is a site where women healing doctors must go to receive the highest form of curing powers. (Theo. 83.) Prayer seats at Doctor Rock face Chimney Rock. (Tr. 89-90.)

The planned road would *bisect the area* and sever the interconnectedness between Chimney Rock uphill and Peak 8 and Doctor Rock downslope. (Tr. 96.)

The purpose of the road is to provide a route for hauling timber (Pet. 3), and the Forest Service expects that each day 34 lumber trucks (which are about three times as noisy as an automobile (DEIS 97)), and more than 130 other vehicles (including logging support vehicles and ad-



ministrative and tourist traffic) will cross the six miles of road bisecting this area where critical religious practices are conducted. (FEIS 34.)

The sights and sounds of traffic on the road would make it impossible to meditate and to achieve the trance. (Tr. 324, 341-342; Theo. 105.) Accordingly, the practice at issue here, a practice at the very core of the religion, would be severely disrupted.

Before the Forest Service contracted with the ethnographer, Dr. Theodoratus, to study the religious practices, it acknowledged that "if one accepts that visual, audible and psychic elements constitute an essential attribute" of the ceremonial locations, then any of the road routes through the Chimney Rock corridor would impact them. (DEIS 113.) After Dr. Theodoratus submitted her report, and it was reviewed and approved by the Forest Service's own expert, Dr. Winters (Tr. 183-186), there was no longer any question, and the Final EIS for the road acknowledges that its impacts on religious uses are adverse effects which will not be avoided. (FEIS 70.)

As Dr. Winters testified, the road would have to be moved 15 or 20 miles away to avoid disrupting the religious practices. (Tr. 205-206.) In discharging its obligation to consider alternatives under the National Environmental Protection Act (42 U.S.C. §§ 1600 et seq.), the Forest Service did look at two other routes for the road link which would have been out of the area and accordingly would have avoided the impacts. (FEIS 13.) However, as noted by the district court, the Forest Service ultimately rejected these alternate routes because of their considerably greater length and the concomitantly greater construction costs and timber haul costs. (Pet. 74a.)

At the time of the Forest Service decisions to construct the road and log the high country, there was in effect a Forest Service management directive issued pursuant to the American Indian Religious Freedom Act. ("AIRFA," 42 U.S.C. § 1996.) This directive required Forest Service line management to invite native traditional religious leaders to provide input at the preparatory stage of land management planning. It further directed how the results of the consultation should guide land management:

"When examination and consultation determine a need to protect or preserve certain lands or sides, this will be accomplished in and through the land management plan." (Pl. Ex. 6 at 26; Tr. 1407.)

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## REASONS FOR DENYING THE PETITION

1. The decision of the court of appeals below is consistent with the decision of this court last year in *Bowen v. Roy*, — U.S. —, 106 S.Ct. 2147 (1986) and consistent with the decisions of other courts of appeals which have considered Indian's free exercise claims relating to development of public lands. Relief in this case was granted *not, per se*, because the development would be in conflict with the Indians' religious beliefs, but because it would impair essential religious *practices*.

In the *Roy* case, this court reviewed Mr. Roy's claim that because he believed that the government's recordkeeping use of a Social Security number to identify his daughter would impair her spiritual growth, the government should be required to provide her welfare benefits without

using such a number. Mr. Roy ascribed his belief to his Indian tribal religion and invoked AIRFA, the American Indian Religious Freedom Act, as well as the Free Exercise Clause. This court denied the claim because the government's use of a Social Security number for his daughter did not "in itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." (Slip. Op. 7.) As the court noted, AIRFA's assurance of "freedom to believe, express, and exercise" Indian religion, "accurately identifies the mission of the Free Exercise Clause itself." (Slip. Op. 6.) However, neither the Constitution nor AIRFA assures, and "appellees may not demand[,] that the Government join in their chosen religious practice" when it comes to matters that relate only to the Government's "own internal affairs," such as using a Social Security number for recordkeeping, or "the size or color of the Government's filing cabinets." (*Id.*)

Thus, the *sole test* of the Free Exercise Clause is whether government action *impairs the freedom to believe, express, and exercise* one's religion, and it does not matter that government action may *otherwise* be inconsistent with one's religious beliefs.

The court of appeals below, after citing the rule as articulated in *Roy*, distinguished its outcome as follows:

"[Roy] was seeking to attack the government's conduct of its own internal operations, simply because they offended his religious sensibilities. Here, however, the proposed road-building and logging operations would greatly impair religious exercise of the plaintiff Indians in the only place where they can be performed." (Pet. 11a; Footnote omitted.)

The other courts of appeal have also found that inconsistency of government land management programs with Indian religious beliefs is not *itself* sufficient to establish a Free Exercise Clause claim. They have looked to see whether the government action resulted in an impairment of a religious *exercise* or practice. Contrary to the facts in this case, however, they have not found that the evidence established such impairment.

In *Wilson v. Block*, 708 F.2d 735, 745 (D.C. Cir.) cert. den. 464 U.S. 956 (1980), the court concluded, "[t]he plaintiffs simply have not demonstrated that development will prevent them from engaging in any religious practice." In *Crow v. Gullet*, 706 F.2d 856 (8th Cir.) aff'g 541 F.Supp. 785 (D.S.D.), cert. den. 464 U.S. 977 (1983) the court upheld the trial court finding that "[p]laintiffs failed to establish that particular religious practices were damaged by the construction." (541 F.Supp. at 591.) In *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.) cert. den. 449 U.S. 954 (1980) the court found that plaintiffs had "fallen short of demonstrating that worship at the particular geographic location" was required by the religion.

The Forest Service does not attempt to challenge as "clearly erroneous" (FRCP Rule 52(a)) the trial court's factual findings that the visual, aural and environmental impacts of its land-use projects will impair the religious practices conducted in the high country. It does, however, seek to undermine those findings with a claim (tucked away in its discussion of countervailing government interests) that Judge Beezer's dissenting opinion below shows "the construction of the road will have little effect on respondents' religious practices." (Pet. 24.) Since the petition

does not seek to show that the trial court findings are clearly erroneous, the claim should be disregarded. (*Icicle Seafoods, Inc. v. Worthington*, 475 U.S. —, 106 S.Ct. 1527 (1986).) Nevertheless, we will explain briefly how Judge Beezer's conclusions were based upon very serious factual errors.

First Judge Beezer rejected the conclusion of the Forest Service's own expert report, the Theodoratus report, based upon his reasoning that the subfindings did not support the conclusion that the road would seriously impair religious practices. In an *enormous factual error*, however, he analyzed the subfindings of the *wrong* portion of the report, i.e., that portion treating impacts on *archaeological resources* rather than the portion treating impacts on *religious practices*. As shown by the table of contents, the report is divided into distinct parts. Part I, the "Ethnographic Component" (pp. 7-107), was prepared by Dr. Theodoratus herself (p. 4) and treats the impacts on current religious practices, whereas Part III (pp. 184-413), which was prepared by the archaeologists Dr. and Mrs. Chartkoff (p. 4), discusses impacts on archaeological resources. The Beezer opinion examines *solely* the findings regarding archaeological impacts (set forth at pp. 368 to 372), which are, of course, primarily concerned with potential ground disturbances of more-or-less discrete sites. Accordingly, the analysis is simply valueless, rather like an opinion on air impacts based upon a review of a study of water impacts.

Judge Beezer also doubted the district court findings that the auditory and visual disturbances from the road would impair the Indians' religious practice. Although he

acknowledged that practices conducted near the road would be disturbed by the noise, he felt that in the large area encompassed by the high country, it had not been shown that practitioners could not get away from the noise. Not only, however, does the sound carry for miles in the high country, but as is abundantly clear from Dr. Theodoratus' ethnographic report and the testimony at trial, the high country is anything but homogenous, so that even if one were able to find a topography depression somewhere where the noise from the road would not penetrate, that depression would not fulfill the various ceremonial needs associated with the high country. Rather, as discussed in the statement above, one must go to specific places, and in fact, the sight and sound of the road will strongly intrude on the most powerful of such places. Accordingly, it is clear that Judge Beezer's dissent simply ignores the facts, and, realizing this, the Forest Service has chosen not to rely on it to claim that the trial court findings were clearly erroneous.

The decision of the court of appeals is soundly based factually and is consistent with all relevant precedent.

2. The Freedom of Exercise Clause protects against government impairment of religious practices whether or not that impairment takes the form of a "penalty" or "prohibition", although some element of coercion is typical of cases which courts are generally presented by mainstream religions. Moreover, AIRFA, and its interpretation by the Executive Branch and Forest Service support a constitutional interpretation consistent with the relief granted below.

Since our Constitution "affirmatively mandates accommodation, not merely tolerance, of *all* religions . . ."



(*Lynch v. Donnelly*, — U.S. —, 104 S.Ct. 1355 (1984); emphasis added); and since religious beliefs are not entitled to less First Amendment protection because they are not mainstream or "traditional" (*Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981)), or even where they are not "acceptable, logical, consistent, or comprehensible to others" (*Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)), it follows that non-mainstream religions must be accommodated according to their particular needs, and not simply to the extent and in the manner that other religions have been found to require protection in prior cases.

There are profound differences between American Indian religions and mainstream religions, which result in correspondingly different needs for accommodation. These differences were explained in the Executive Branch's "American Indian Religious Freedom Act Task Force Report" (PL Ex. 6; hereinafter, Task Force Report), submitted to Congress in August 1979, in response to the congressional mandate of AIRFA.

As described in the Task Force Report, the mainstream religions are commemorative in that they trace their origins back to a specific person or event. (E.g., Jesus, Buddha, the Exodus.) The mainstay of their beliefs is the doctrine that their particular interpretation of reality, usually revealed by the religion's founder, is the ultimate truth. Religious institutions were established to carry on the task of interpreting the truth for each generation and of protecting it from heresies. The location at which ceremonies take place is of secondary importance to continuing the tradition of the "laws" of God. Religious institutions have often sought to impose their religious laws on the

historical process, oppressing those to whom their laws are considered foreign or heretical. It is from this commemorative tradition that most current inhabitants of the United States come, many early immigrants having come to escape religious oppression. From their bitter experiences came the demand for constitutional protection against the establishment of religion. (Task Force Report, at 8-9.)

The tribal religions, including the American Indian religions, "represent the opposite pole of human experience." (Task Force Report at 10.) They are older than the founded religions and their origins are lost in the mists of time. They do not seek to interpret the ultimate truth, and they have no institutions. Rather, they perpetuate rituals which must be carried out in the particular place and manner as given to the people in the beginning in order to preserve the world and the tribal interests. For them, religious freedom means the ability to maintain their relations with the natural world. (*Id.* at 10-11.)

Accordingly, while the right of free exercise in the mainstream religions may require permission to follow religious laws without being subject to government penalty, free exercise in the tribal religions requires the preservation of sacred areas in their natural state.

AIRFA was born out of Congress' concern that the U.S. government had been thoughtlessly violating Indians' right to practice their religion, which is so different from mainstream religions. This concern is reflected in the House Report:

"Native Americans have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well

as by many State and tribal constitutions. The practice of traditional native Indian religions, outside of the Judeo-Christian mainstream or in combination with it, is further upheld in the 1968 Indian Civil Rights Act.

"Despite these laws, a lack of U.S. governmental policy has allowed infringement in the practice of native traditional religions....

" . . . . .

"[I]t has become apparent that . . . administrative policy directive, in fact, ha[s] interfered severely with the culture and religion of American Indians. (H.R. Rep. No. 1308, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. Code Cong. & Ad. News, pp. 1262-1263."

The House Report found the government's violations to stem in part from the kind of ethnocentric thinking which the Forest Service displays here:

"Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal government's interaction with traditional Indian religions and cultures. This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as 'real' religion. Yet, the effect on the individual whose religious customs are violated or infringed upon is as onerous as if [he] had been Protestant, Catholic, or Jewish." (*Ibid.*, at 1265.)

Accordingly, Congress felt it necessary to affirmatively declare the policy to protect the constitutionally guaranteed freedom to exercise Native American religions, and to *describe substantively* some of those things which it felt the right included, i.e., "including but not limited to

*access to sites*, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights." (42 U.S.C. § 1996; emphasis added.) Next, to make sure that the Act would be more than just a ringing declaration, it required the Executive Branch to evaluate federal policy in consultation with native traditional religious leaders, and to report on the evaluation to Congress within a year. The House Report explained, "[t]his section is designed to insure that a detailed analysis of the specific regulatory or procedural changes that may be necessary are identified and implemented in a systematic and thorough manner." (H.R. Rep., *supra*, 1978 U.S. Code Cong. & Ad. News at 1264.) Thus, it is clear that Congress intended the Task Force Report to be both an administrative interpretation of the Act, i.e., a description of what administrative accommodations would be required in order to carry out AIRFA's policy of protecting freedom to exercise Native American religions, and a commitment to make the necessary changes in administrative procedure.

The Task Force Report supports the interpretation that AIRFA's guarantee of "access to sites" comprehends the preservation of the natural qualities which are essential to the religious practices conducted there:

"Physical access to the land and its natural products must also include the preservation of the natural conditions which are the *sine qua non* of that access."

The Forest Service *specifically embraced* the interpretation of AIRFA as requiring it to preserve sacred areas of land when necessary to protect Indian religious practices. It reported to the Task Force, which in turn

reported to Congress, that it had issued a policy to line management officials requiring the following: (a) managers must invite native traditional religious leaders to provide input at the preparatory stage of land management planning and (b):

“When examination and consultation determine a need to protect or preserve certain lands or sites, this *will be* accomplished in and through the land management plan.” (Task Force Report at 26; emphasis added.)

Accordingly, the Forest Service’s own interpretation of AIRFA, which in turn is the congressional interpretation of the requirements of the Free Exercise Clause, is that not only must access to sacred lands be granted, but the preservation of natural qualities which are the *sine qua non* of that access must be assured. Moreover, Forest Service policy requires its managers to assure such preservation. The rules of law are basic that courts should defer to administrative interpretation of a statute unless clearly erroneous (e.g., *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)) and that an agency is bound by its own rules. (*United States v. Nixon*, 418 U.S. 683, 694-696 (1974).)

3. The Forest Service’s interest in “administering the public lands in a manner consonant with congressional directives and responsive to myriad competing public policy concerns” (Pet. 22) is, of course, not the kind of “paramount” interest which will justify infringement on freedom of religion. (See *Sherbert v. Verner*, 374 U.S. 398, 406 (1967).) We must assume that every agency would prefer to have its discretion limited only by the Congress

and not also by the Constitution,<sup>3</sup> but to hold that an agency’s desire to have fewer constraints on its discretion constitutes a compelling governmental interest would be to read the Free Exercise Clause right out of the Constitution. It does seem ironic that the Forest Service seems prepared to accept that it must obey congressional law but not that it must obey the higher law of the Constitution.

As the Indian respondents have discussed in their brief in opposition to the petition (at 13-14), generalized claims of governmental interest are never sufficient to justify impairment of religious freedom, and the Forest Service petition does not address the district court findings that the particular purposes asserted by the Forest Service for the road-building and logging projects would either not be “materially served” or would fall “far short” of a compelling state interest. (Pet. 66a, 67a.) *Nevertheless*, however, a concern for the government’s generalized interest in managing its property has *already been factored into* the test established by other courts of appeal and used in the case here to determine whether the management of public lands constitutes a constitutionally cognizable burden in the first place.

The issue was examined most recently in *Wilson v. Block*, *supra*, 708 F.2d 735, 743-744. The court there said:

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3. In fact, the Forest Service’s discretion is also limited by state regulation *unless* Congress has enacted legislation that would clearly pre-empt the state requirement. *California Coastal Commission v. Granite Rock Co.*, — U.S. — (No. 85-1200, March 24, 1987). Indeed, California’s statute providing that no public agency “shall cause severe or irreparable damage to any Native American . . . place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require” (Public Resources Code § 5097.9) may apply.



"We agree with *Sequoyah's* [*Sequoyah v. TVA*, *supra*, 620 F.2d 1159] resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion. We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."

The court then explained that in establishing this narrow test of a cognizable burden "we pay due regard to the government's rights and duties in its land." (*Id.* at fn. 5.) Thus, we see that the Forest Service discretion already gets something of a "free pass" in the very beginning of the analysis, and the courts will not even look to see if the purposes asserted for Forest Service projects will be "materially served" or whether those purposes fall "far short" of compelling governmental interests unless the plaintiffs overcome a very high threshold for showing a religious burden.

Finally, the question here is not even whether the Forest Service can complete its road, but whether it must take a longer, more expensive route, and it is not whether it can harvest timber, but whether it can do so on this isolated area which it has never harvested before and which the California Wilderness Bill now for the most part precludes anyway.

In sum, the decision below does not greatly affect the Forest Service's discretion.

4. The decision below not only does not greatly impair Forest Service discretion in this case, neither does it

open the floodgate of claims that would impair the Forest Service's future ability to manage the National Forest.

First, as discussed above, the test established by the courts of appeal and followed in this case establishes a very high threshold for showing that government land management impairs free exercise.

Second, although the Forest Service posits the mushrooming of "new" religions (Pet. 26), this court has shown in *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) that courts are quite capable of distinguishing choices which are "philosophical and personal rather than religious." In finding that people of the Amish faith were entitled to Free Exercise Clause protection from having their children sent to secondary school, the court gave weight to the fact that their claim was supported by "almost 300 years of consistent practice." (406 U.S. at 219.) In the instant case, as the district court pointed out, ceremonial use of the high country is known to date at least back to the early 19th century, and it probably dates back much further. (Pet. 58a.)

Finally, the relation of Native Americans vis-a-vis sacred sites on public lands is *sui generis*. All the land, including sacred sites, once, of course, belonged to the Indians. But the European immigrants, now the dominant culture, arrogated unto themselves the authority to extinguish aboriginal property rights based upon *express and invidious discrimination against Indian religion*.

In 1823, in the case of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Justice Marshall explained, not without the grace to show some embarrassment at the hubris

involved, the basis on which the Christian nations of Europe used the distinction between Christian and non-Christian peoples as a principle to deprive Indians of their aboriginal title, and how the United States adopted that principle as the basis for establishing title. We ask Justice Marshall to speak:

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity . . . ." 21 U.S. at 572-573.)

" . . . . .

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.

"The history of America . . . proves . . . the universal recognition of these principles [of the right of discovery]." (21 U.S. at 574. )

" . . . . .

"The right of discovery [was] confined to countries then unknown to all Christian people . . . Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and

at the same time, admitting the prior title of any Christian people who may have made a previous discovery." (21 U.S. at 576-577.)

The Indians did not agree with the potentates of Europe that the opportunity to abandon ~~their~~ own religion for Christianity constituted a fair bargain for the loss of their land, and "[t]he Europeans were under the necessity either of abandoning the country and relinquishing their pompous claims to it or of enforcing those claims. . . ."

In spite of his moral misgivings, however, Justice Marshall ultimately concluded as follows:

"Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title . . . ." (21 U.S. at 589.)

and

"However extravagant the pretension . . . , [h]owever this . . . may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, . . . it . . . certainly cannot be rejected by Courts of Justice." (21 U.S. at 591-592.)

Thus, the Indians suffered at the hands of the government what may be the ultimate "penalty" for their beliefs, i.e., the loss of all of their land, including their sacred areas. Because of this particular history, the First Amendment at the very least means that federal stewardship of those sacred lands is impressed with a fiduciary duty not

to manage them in such a way as to interfere with the religious practices which since time immemorial have been associated with them.

The court of appeals decision does not open the floodgate to claims that will impair the Forest Service's ability to manage the national forests.

---

**CONCLUSION**

The Petition for Writ of Certiorari should be denied.

March 1987

Respectfully submitted,

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# REPLY BRIEF

(5)  
No. 86-1013

Supreme Court, U.S.  
**E I L E D**

**APR 14 1987**

**JOSEPH E. SPANIOLO, JR.**  
**CLERK**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1986**

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**RICHARD E. LYNG,**  
**SECRETARY OF AGRICULTURE, ET AL., PETITIONERS**

**v.**

**NORTHWEST INDIAN CEMETERY PROTECTIVE**  
**ASSOCIATION, ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO**  
**THE UNITED STATES COURT OF APPEALS FOR**  
**THE NINTH CIRCUIT**

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**REPLY MEMORANDUM FOR THE PETITIONERS**

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**CHARLES FRIED**  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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6/1/87

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**In the Supreme Court of the United States**

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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**REPLY MEMORANDUM FOR THE PETITIONERS**

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1. Respondents argue (State of California Br. in Opp. 7-11; Indian Resp. Br. in Opp. 10-12) that the decision below rests on the peculiar facts of this case and therefore does not conflict with the decisions of the other courts of appeals or with this Court's decision in *Bowen v. Roy*, No. 84-780 (June 11, 1986). The courts below found a burden on Indians' free exercise rights—even though the construction of the G-O road would not bar the Indians from visiting religious sites and would not physically prevent the Indians from engaging in any religious act—because the natural conditions necessary for the success of the Indians' religious ritual would be vitiated by construction of the road. See Pet. App. 7a-11a, 63a-66a; see also State of California Br. in Opp. 6, 9-11.

As we showed in our petition (at 15-18), other courts considering similar claims by Indians under the Free Exercise Clause have found such effects insufficient to make out a constitutional claim. These courts have refused to require the government to manage federal lands in a way that guarantees Indians the privacy and other conditions needed for the success of religious rituals. See *Badoni v. Higginson*, 638 F.2d 172, 178-180 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); *Crow v. Gullet*, 541 F. Supp. 785, 791-792 (D.S.D. 1982), aff'd on opinion below, 706 F.2d 856 (8th Cir.), cert. denied, 464 U.S. 977 (1983). Far from resting on its own specific facts, therefore, the differing result reached by the court below stems from that court's dramatically different view of what constitutes a burden upon the free exercise of religion giving rise to a claim under the Free Exercise Clause.<sup>1</sup>

Indeed, this Court in *Bowen v. Roy*, *supra*, recognized the difference between a Free Exercise Clause challenge to government action on the ground that it directly prohibits or penalizes a practice dictated by a religious belief, and a challenge on the ground that neutral government action is alleged to impair the effectiveness—under the individual's own system of beliefs—of the individual's religious practice. Compare slip op. 8-18 (plurality opinion) with *id.* at 5-7; see also *Hobbie v. Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), slip op. 3-5. The court of appeals simply failed to apply that crucial distinction in this case.<sup>2</sup>

<sup>1</sup>Contrary to the State of California's assertion (see Br. in Opp. 9-11), Judge Beezer's dissenting opinion below reflects his recognition of the majority's application of an incorrect legal standard (see Pet. App. 34a).

<sup>2</sup>Respondents rely heavily (State of California Br. in Opp. 11-16; Indian Resp. Br. in Opp. 15) upon the American Indian Religious Freedom Act, 42 U.S.C. 1996, to support their constitutional claim. But that statute requires consideration of the impact of government action upon Indians' religious practices; it does not impose substantive limits upon an agency's decisionmaking authority. *Wilson v. Block*, 708 F.2d

2. Respondents also claim (State of California Br. in Opp. 16-18; Indian Resp. Br. in Opp. 13-14) that the government interest in managing the public lands is not a compelling interest sufficient to justify a burden upon Indians' free exercise rights. On this point we simply disagree and submit that this ground of difference in itself justifies the granting of certiorari.

We note, moreover, that respondents do not come to grips with the essential difference between government land management decisions and other sorts of government decisions: a decision regarding the permissible uses of federal land requires the government to consider a variety of competing public policy concerns. Thus, by its very nature, a land management decision represents the government's determination regarding the best use for a parcel of real property. And implementation of that decision furthers the government's strong interest that its land be used for what the government finds to be the most appropriate public purpose.<sup>3</sup>

735, 746-747 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983). The district court held that the Forest Service had accorded the required consideration to the religious issues implicated by construction of the road (see Pet. App. 70a-71a). Indeed, the Forest Service's commissioning of a report on Indian religious beliefs and practices and its decision to modify its project so as to lessen the impact on Indian religion (see Pet. 3-6) are models of the responsible administrative action the statute is designed to encourage.

<sup>3</sup>The State of California is plainly wrong in invoking (Br. in Opp. 17 n.3) this Court's decision in *California Coastal Comm'n v. Granite Rock Co.*, No. 85-1200 (Mar. 24, 1987), to support its claim that the Forest Service's authority to construct the G-O road is limited by state regulation. *Granite Rock* concerned the state's authority to regulate certain *private* activities on federally-owned land; nothing in that decision indicates that the state may overcome the federal government's sovereign immunity and regulate federal activities on federally-owned land. Compare *Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *Mayo v. United States*, 319 U.S. 441 (1943).

For the foregoing reasons, and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED  
*Solicitor General*

APRIL 1987



**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
JAN 21 1987

(3)  
No. 86-1013

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In The  
**Supreme Court of the United States**

October Term, 1986

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RICHARD E. LYN, SECRETARY OF  
AGRICULTURE, et al.,  
*Petitioners,*

v.

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, et al.,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE AND BRIEF  
AMICUS CURIAE OF HOWENQUET COMMUNITY  
ASSOCIATION, CARPENTERS' UNION LOCAL 1040,  
TRI-AGENCY DEVELOPMENT CORPORATION, THE  
AREA INDEPENDENT DEVELOPMENT  
CORPORATION, THE CRESCENT CITY-DEL NORTE  
CHAMBER OF COMMERCE, AND DEL NORTE  
TAXPAYERS LEAGUE IN SUPPORT  
OF PETITIONERS**

---

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No. 86-1013

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In The  
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---

On Writ of Certiorari from the United States  
Court of Appeals for the Ninth Circuit

---

**MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

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**INTRODUCTION**

The federal government petitioned this Court on behalf of Richard E. Lyng, Secretary of Agriculture, *et al.*, for a writ of certiorari in the above-captioned case. Amici, Howenquet Community Association, *et al.*, have attempted to obtain permission from respondents to file the attached brief amicus curiae in support of petitioners. This permission has not been forthcoming.

Because of the serious nature of the issues at stake, because of the serious impact the Ninth Circuit's decision

has had on amici, and because of the contribution amici can make to the Court's understanding of the issues, this motion is filed. Amici seek leave of this Court to file the attached brief amicus curiae pursuant to Supreme Court Rule No. 36.1.

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## ARGUMENT

### I

#### **LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE SHOULD BE GRANTED BECAUSE AMICI HAVE CRUCIAL INTERESTS IN THE OUTCOME OF THE CASE AND CAN AID THIS COURT'S UNDERSTANDING OF THE ISSUES**

Collectively, amici represent a broad range of community groups and organizations in Del Norte County with vital interests in the construction of the disputed forest road, known as the "G-O Road," between Gasquet, California, and Orleans, California. These amici and their interests are described in more detail below. By receiving the accompanying brief amicus curiae this Court will better understand why the petition for writ of certiorari should be granted.

#### **A. The Howenquet Community Association**

The Howenquet Community Association is an Indian rancheria (terminated status under reconsideration) located north of Crescent City, California, which consists of 28 Native American families, with over 100 individuals, belonging to the Tolowa Tribe. The members of this rancheria currently suffer from very high unemployment (over 90%) and would greatly benefit from any increased job

opportunities that will become available if the G-O Road is completed. In addition, members of the Howenquet Community Association will be benefited by the increased access into the forest for recreational and religious purposes. The Howenquet Community Association is in support of the completion of the G-O Road so long as the road is compatible with the practice of their religious beliefs. The members of the Howenquet Community Association believe that the G-O Road can be compatible with their religious beliefs provided that the Forest Service respects its proposed buffer zone and does not interfere with the members' privacy during the conduct of religious ceremonies during certain periods of the year. These amici do not believe that the injunction against the G-O Road is either necessary or in their best interest.

#### **B. Carpenters' Union Local 1040**

The Carpenters' Union Local 1040 has approximately 350 members in Humboldt and Del Norte Counties many of whom are economically dependent upon the continuing availability of timber harvesting in the Six Rivers National Forest. They have been adversely affected by the extremely high unemployment rates in Del Norte County which exceeded 20% at time of trial.

#### **C. The Area Independent Development Corporation**

The Area Independent Development Corporation is a local development corporation formed pursuant to the Small Business Investment Act. The purpose of the Area Independent Development Corporation is to foster and promote the economic development of Del Norte County. The purposes of this corporation will be greatly facilitated if the G-O Road is completed.



#### **D. The Tri-Agency Economic Development Authority**

The Tri-Agency Economic Development Authority consists of three governmental bodies: The County of Del Norte, the City of Crescent City, and the Crescent City Harbor District. This organization is designed to coordinate and foster economic development within the County of Del Norte. This organization believes that it is essential to the future well-being of the county that the G-O Road be completed so that the county may find some relief from its severely depressed economic circumstances.

#### **E. Crescent City-Del Norte Chamber of Commerce**

The Crescent City-Del Norte Chamber of Commerce is a voluntary organization composed of independent businesses throughout Del Norte County. The interests of the various members of the Chamber of Commerce will be directly affected by the disposition of this petition. Its members require the renewal of a healthy economic environment in Del Norte County for their continued existence. Members of the Crescent City-Del Norte Chamber of Commerce will be directly affected by the health of the local forest industry which in turn is directly dependent on the completion of the G-O Road. According to the environmental impact statement (EIS) the completion of the G-O Road will greatly enhance the economic viability of the forest industry in Del Norte County. The EIS is generally described in the Ninth Circuit's opinion. See petitioners' Appendix at 3a-4a.

In the EIS it is stated that the road will reduce the transportation costs to appraisal points by \$16 per 1,000

board feet. The road will also result in a fuel consumption savings of approximately 1,196,000 gallons over the next 30 years or 40,000 gallons per year. These significant savings will allow the haulage of timber from the Six Rivers National Forest that otherwise would be uneconomic to harvest.

The businesses represented by amicus chamber of commerce, and other businesses in Humboldt County as well, simply cannot harvest as much timber without the road. Indeed, the Humboldt County Board of Supervisors has endorsed the completion of the G-O Road. Furthermore, the EIS estimates that with completion of the road the Del Norte economy will be the recipient of \$2,528,000 directly from the timber harvesting and an estimated \$4,648,000 in total earnings when multipliers for support services are factored in.

The Ninth Circuit believed that the increase in jobs would be nothing more than the transfer of jobs from one part of California to another. However, the significant reduction in haulage costs from the road will enable the harvesting of much timber that could not be transported economically to Humboldt County for market preparation. This will create an overall increase in jobs. The completion of the G-O Road will be far more beneficial to Del Norte County than detrimental to Humboldt County. For a maximum utilization of the timber reserves in Six Rivers National Forest the G-O Road must be built.

#### **F. Del Norte Taxpayers League**

The Del Norte Taxpayers League consists of approximately 275 members including individuals, business corporations, and associations. The goal of the league is to

ensure the greatest possible economies consistent with efficiency in the collection and expenditures of public moneys. Members also have children in schools which are supported in part by forest reserves. Many members are employed in the logging industry and support businesses.

The members of this organization have a strong interest in the renewed health of the forest industry of Del Norte County. For many years the County of Del Norte has been the recipient of substantial revenues derived from the taxation of forest products by virtue of 16 U.S.C. § 500 which provides that the county within whose jurisdiction a national forest is located shares 25% of the national forest's receipts on timber harvesting. The EIS shows for example that in 1977 23.6% of the county's income derived from operations of the Six Rivers National Forest which covers 67% of the county's land area. EIS at 29. In the transcript of the trial proceedings for March 29, 1983, at Page No. 1492, Ernest Perry, Del Norte County's director of building and planning, testified that in the 1979-80 fiscal year \$1,228,000 was received from the national forest receipts of which \$940,000 was spent for a general fund for schools, \$184,000 for a school service fund, and \$104,000 for the county's junior college. Mr. Joseph H. Harn, the forest supervisor for the Six Rivers National Forest, testified on March 28, 1983, that if the G-O Road were completed there would be a better return to *all* counties involved because transportation costs would be reduced, more timber collected, and therefore higher school revenue funds would be collected. See transcript at 1249, 1253, and 1298.

In addition to the funds derived from 16 U.S.C. § 500, the county also receives yield tax payments that are levied on timber operators by the state. This rate is set each year and at the time of trial was 8.1% of the harvest value.

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## CONCLUSION

The interests of amici in favor of the completion of the G-O Road as planned are manifest. The road will not only allow the revitalization of a devastated forest economy, but is compatible with amicus Howenquet's practice of religious beliefs. Amici's need for the G-O Road must be balanced against supportable allegations of infringement of religious practices yet the court below failed to do so. Instead, the Court created a public land religious sanctuary by an extraordinary misreading of the Infringement Clause of the First Amendment of the United States Constitution. By so doing the Court has created a case of both local and national significance to which amici provide valuable input. The amici's vital stake in the road must be considered when this Court weighs whether to grant the petition for writ of certiorari and whether the judicial creation of a public land religious sanctuary at the public expense warrants the sacrifice of the public's interest in favor of the road completion.

For these reasons amici curiae respectfully request leave to file the attached brief amicus curiae.

DATED: January 20, 1987.

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No. 86-1013

—o—  
In The  
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RICHARD E. LYNQ, SECRETARY OF  
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On Writ of Certiorari to the United States  
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—o—

**BRIEF AMICUS CURIAE OF HOWENQUET  
COMMUNITY ASSOCIATION, CARPENTERS'  
UNION LOCAL 1040, TRI-AGENCY DEVELOPMENT  
CORPORATION, THE AREA INDEPENDENT  
DEVELOPMENT CORPORATION, THE CRESCENT  
CITY-DEL NORTE CHAMBER OF COMMERCE,  
AND DEL NORTE TAXPAYERS LEAGUE  
IN SUPPORT OF PETITIONERS**  
—o—

**INTEREST OF AMICI**

Interests of amici are outlined in the Motion for  
Leave to File Brief Amicus Curiae.  
—o—



## OPINIONS BELOW

The decision of the United States District Court for the Northern District of California is reported in *Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983). The Ninth Circuit originally decided the case on June 24, 1985, but withdrew the decision, granted a rehearing, and decided the case as reported in *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (9th Cir. 1986). Both opinions are reproduced in government-respondents' appendix to petition for certiorari.

---

## STATEMENT OF THE CASE

This case stems from the long struggle of the Forest Service and local community to complete the construction of the paved all-weather road linking the communities in Gasquet and Orleans. In addition to linking the two communities, the road will provide for the economical harvesting of additional timber reserves, augment access to the national forest for recreational and spiritual purposes, and increase Forest Service efficiency in managing their lands.

The opponents of this road have long fought its construction citing a variety of rationales for their advocacy of nondevelopment. To accommodate the religious needs of some of the local inhabitants the Forest Service designed the road and its accompanying timber plan<sup>1</sup> with

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<sup>1</sup> The timber plan is not a part of this appeal.

buffer zones and an environmentally sensitive design in order to eliminate impacts on the local Native American religious ceremonies. However, despite this accommodation, the opponents of the road pressed on, and succeeded in convincing the courts below that no road should ever be built in this region, and that the entire "high country" should forevermore be maintained for the single purpose of a sanctuary for wilderness and religious ceremonies. This permanent judicial lockup of the region for religious purposes is contrary to the intent of Congress when it authorized road construction, the management decisions of the Forest Service, and the many local interests who actively support the construction of the road. Indeed, what has happened in this case is not the necessary and proper accommodation of religious worship, which was more than adequately provided for in the Forest Service plan, but instead is the set-aside of a substantial acreage of public land for a religious sanctuary. This permanent dedication of public lands for a solely religious purpose stems from an extraordinary misreading of the Infringement Clause of the First Amendment to the United States Constitution and should be reversed.<sup>2</sup>

---

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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<sup>2</sup> Although the government's petition is not based upon any Establishment Clause issues, it should be noted that this religious sanctuary set-aside raises the serious question of whether the lower courts' decisions create an unlawful establishment of religion.

## SUMMARY OF ARGUMENT

Certiorari should be granted for the following reasons:

1. The courts' set-aside of a substantial portion of the public lands for a religious sanctuary is contrary to the spirit and intent of federal statutes. The federal laws that created and expanded the Redwood Region National Park intended that the road be built and the Multiple Use and Sustained Yield Act of 1960 gives the Forest Service broad management authority over the national forest.

2. The court's creation of a religious sanctuary is in conflict with the law of other circuits. By failing to seriously ask whether the minimal intrusion represented by the road, with its *substantial* mitigation measures, actually causes a religious infringement, by failing to consider the true nature and extent of religious practices on the public lands, and by failing to balance other justifications for road construction, the Ninth Circuit established a dangerous precedent for the creation of public land religious sanctuaries when there is no real infringement of First Amendment rights.

---

## ARGUMENT

### I

#### THE COURT'S SET-ASIDE OF A SUBSTANTIAL PORTION OF THE PUBLIC LANDS FOR A RELIGIOUS SANCTUARY IS CONTRARY TO FEDERAL LAW

When the Redwood National Park was created in 1968, Congress intended to mitigate the substantial loss of redwood timber harvesting revenues and jobs through the

accelerated development of timber harvesting in the Six Rivers National Forest. In its report on the Redwood National Park Bill, which was to become 16 U.S.C. § 79a, *et seq.*, the Senate Committee on Interior and Insular Affairs made several references to a road development program in the Six Rivers National Forest. See Senate Comm. on Interior and Insular Affairs, Rep. No. 641, 90th Cong. 2d Sess., *reprinted in*, 1968 U.S. Code Cong. & Ad. News 3913, 3919, 3925. The Senate committee included a letter from then Governor Reagan stating "it has been argued by the Forest Service that an increased timber cut in the Six Rivers National Forest would eventually compensate [for the loss of timber operations in the Redwood National Park]." *Id.* at 3919. The Senate committee report continues that "with a capital investment of \$11 million for the new road construction and reconstruction the Forest Service could make available an increased cut." *Id.* at 3925. It was well understood that the G-O Road would be completed in order to mitigate the economic damage resulting from the creation of the Redwood National Park. By enjoining the construction of the G-O Road, the courts below have acted contrary to the intent of Congress and have frustrated the economic development of the region.

Furthermore, the Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528, declares: "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Prohibition of the forest road in this case will result in the preclusion and inhibition of other forest uses, including timber and recreation, for the express purpose of maintaining a religious sanctuary. This single purpose use set-aside is contrary to the letter and spirit of the

Multiple Use Sustained Yield Act and, as will be seen, is not justified by any allegations of religious infringement.

## II

### THE COURT'S CREATION OF A RELIGIOUS SANCTUARY IS IN CONFLICT WITH THE LAW OF OTHER CIRCUITS

Native American religious ceremonies often involve the use of a particular area of land or geographic feature in sacred rites. This unique requirement of land-based religious worship gives rise to an inherent conflict between the exercise of First Amendment rights and other legitimate uses of the public lands. When other courts or agencies have been confronted with this problem they uniformly attempted to accommodate the religious requirements of Native Americans. They did not, as did the courts below in this case, work a wholesale sacrifice of valuable public lands for a single purpose religious sanctuary.

Other courts which have taken a more reasoned approach to this problem have come to conclusions opposite those of the Ninth Circuit for two principal reasons: First, they have been chary to uncritically and too readily find an infringement upon the practice of religion where no such infringement necessarily exists, and second, they have been reluctant to violate the establishment prong of the First Amendment. If the courts below in this case had as carefully weighed the effects of the G-O Road and the consequences of setting aside the territory as a religious sanctuary, then a different conclusion would have been reached consistent with the rulings of the other circuits.

#### A. If the Ninth Circuit Had Correctly Followed the Analyses of Other Circuits It Would Have Found No Significant Burden on the Respondents' Free Exercise of Religion

The burden upon an individual's free exercise of religion, imposed by government action, must be significant in order to trigger further consideration of the Free Exercise Clause. Two factors are significant in determining whether an alleged burden on the free exercise of religion exists: First, the burden must be on a central or at least an indispensable tenet of the religion in question; secondly, where site-specific religious practices are involved a burden is more significant when the complaining parties have some sort of property interest in that area. *See, e.g., Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

Several recent cases have clearly held that Native Americans have no cognizable free exercise claim when they are unable to demonstrate that a challenged government action adversely affects a central aspect of their religion. For example, in *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980), Cherokee Indian plaintiffs attempted to block the completion of the Tellico Dam, better known as the home of the snail darter, on grounds that the dam would flood their "sacred homeland." *Id.* at 1160. Because the valley was not shown to play a "central role" in the religion, however, no significant burden was found to exist. *Id.* at 1164. It should be noted that the proposed action, the flooding of the valley, would surely have burdened the Cherokees' religious practices if that valley had been central to their religion. Here, the plaintiffs have *not* shown that the



*mitigated* road would touch or affect any area *central* to their religion.

Other courts have looked to see whether a government action blocks access to land "indispensable" to the practice of the religion. For example, in *Wilson v. Block*, 708 F.2d at 735, the court found that the land on which the Snow Bowl Ski Area was built had to be indispensable, whether or not central, to some religious practice for there to be a free exercise burden. *Id.* at 743. It was not in that case. *Id.* at 744-45. Likewise, in *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), the court found a ban on overnight camping in a park did not affect an indispensable religious practice. *Id.* at 792.

In the case under consideration the respondents have not shown any denial of access to land which creates any significant burden on their religion. While the courts below found that use of the high country was "central and indispensable" to the Indian respondents' religion neither the respondents nor the court demonstrated that the construction of the G-O Road as mitigated would degrade the high country, their access to it, or actually intrude upon the sanctity of the high country. See *Northwest Indian Cemetery Protective Association v. Peterson*, petitioners' Appendix at 22a-37a (Beezer, J., dissenting). Indeed the Forest Service chose an alternative plan with large buffer zones around its operation in order to preserve the pristine environment and opportunity for solitude. Thus, while the high country itself may arguably be central or indispensable to the Indian religious practices, there has been no showing that the use of that high country will be

significantly burdened by the Forest Service road. The Forest Service, after carefully weighing all of the evidence (*see* EIS), reasoned that its plan would not infringe upon religious practices. No evidence has been presented that establishes that the road, as planned by the Forest Service, would so significantly reduce the area's isolation that there would be any interference with religious practices. Instead, the courts have substituted their judgment for that of the Forest Service. Simply put, the courts below seem to have found an infringement where none exists.

Furthermore, the respondents have no property interest in the high country. It is national forest land held by the United States government for the benefit of *all* its citizens. The issue of the importance of a property interest to a sacred area is unsettled. Some courts have implied it to be a prerequisite to establishing a burden on the practice of site-centered religious practices. See *Crow v. Gullet*, 541 F. Supp. at 794. Other courts have found a property interest not necessary but a factor in considering a free exercise claim. See, e.g., *Sequoyah v. Tennessee Valley Authority*, 620 F.2d at 1164; *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980); and *Wilson v. Block*, 708 F.2d at 744 n.5. As the court said in *Wilson*:

"[W]e decline to follow those cases . . . which have held, apparently, that the Free Exercise Clause can never supersede the government's ownership rights and duties of public management. . . . This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis." *Id.*

Unlike every other circuit that has examined the issue, the Ninth Circuit has totally ignored the effect of the lack

of a property interest in the "high country." In the present case, the lack of a property interest held by the respondents should be considered in deciding whether the government can be compelled to subjugate other legitimate uses of the national forest to Indian religious practices. The road will not introduce new uses into property owned by respondents; it will only allow for the continuation of multiple use of federal lands in accordance with the Multiple Use and Sustained Yield Act. Because the road will not affect any use of private property and will not introduce significant different uses into the public land near the high country, respondents have not shown that the Indian religious practices have been significantly burdened.

Finally, in *Wilson v. Block*, *supra*, the court held, "the First Amendment requires, at a minimum, proof that the religious practice could not be performed at any site other than that to be developed." *Wilson v. Block*, 708 F.2d at 744 n.5. Using this test, it is clear that respondents have once again failed to satisfy their burden. Indeed the sites crucial to the religious practices here will not be developed, but together will be set aside and protected with a buffer zone. And no showing was made that no other land is available for religious practices. Thus, the road opponents have made no cognizable claim that their free exercise rights have been burdened.

**B. The Ninth Circuit Improperly Balanced the Compelling Government Interests for Road Construction Against the Need to Establish a Religious Sanctuary**

In this case there is more at stake than the protection of a few sacred sites from development. Rather, in the Ninth Circuit's words, the "entire region" is "sacred"

and must be set aside. *Northwest Indian Cemetery Protective Association*, 795 F.2d at 690 (emphasis added). This unprecedented judicial action to establish a religious sanctuary is at complete odds with the records and analyses of the other circuits.

In every other recent case involving similar conflicts between the need for the government not to interfere with traditional religious practices and the proscription against governmental involvement in religious affairs the courts have not seen fit to turn public lands into private religious preserves. In *Badoni v. Higginson*, 638 F.2d 172, the federal government was asked to lower the level of Lake Powell because the lake had inundated the sacred site of certain Navajo religious ceremonies near Rainbow Bridge. In addition, the park service was requested to restrict tourist access to the site and to regulate the conduct of visitors in order to prevent them from behaving disrespectfully at the holy place. The court decided first that the religious practices of the Navajos were not so impaired as to require the lowering of the level of Lake Powell. The court also stated that the requested visitor regulation by the park service would be "a clear violation of the Establishment Clause." *Id.* at 179. Clearly, governmental interests overrode the allegations of infringement and dangers of establishment.

While in the present case no requests have yet been made for the restriction of public access, the Forest Service has been enjoined to act in a manner that will, for all practical purposes, restrict the access of the public to the Blue Creek Unit of the Six Rivers National Forest.

Similarly, in *Crow v. Gullet*, 541 F. Supp. 785, the State of South Dakota was asked to stop all development

in Bear Butte State Park because it interfered with Indian religious practices. The court found that there had been no unconstitutional interference with Indian religious practices. In addition, the court examined the state activity at the park which served to accommodate the religious practices in question. Specifically, the state imposed time and area restrictions upon non-Indian visitors while Indian visitors had no comparable restrictions. Furthermore, the state maintained the park in a manner "to serve and assist Indian worshipers." *Crow v. Gullet*, 541 F.Supp at 789. The District Court did not reach the constitutionality of this state accommodation but did give clear warning that the state was treading on dangerous ground and "risks being haled into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become 'excessively entangled' with religion, in violation of the Establishment Clause." *Id.* at 794. Again, without reaching the establishment issue, it is plain that caution must be exercised before mandating drastic remedies designed to avoid an infringement on access to an unfettered use of an area central to religious practices.

Finally, in *Hopi Indian Tribe v. Block*, No. 81-0481 (D.D.C. June 15, 1981) (unpublished memorandum opinion), reported in part in 8 Indian L. Rep. 3073 (1981) (*Hopi Indian Tribe v. Block*, 8 Indian L. Rep. 3073), *aff'd on other grounds sub nom.* in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir 1983), *cert. denied*, 464 U.S. 956 (1983), the Forest Service was asked to remove existing ski facilities from the Snow Bowl Ski Area, or at least prohibit any expansion of the area, on the grounds that the ski area burdened the practice of the traditional Navajo and Hopi

religious ceremonies. *Id.* at 739. The District Court decided first that there was no unconstitutional infringement upon the practice of the Indian religion. In addition, the court held that to remove or disallow the expansion of the ski facilities would restrict public access to the mountain, an unjustified use of the First Amendment which is also in violation of the Establishment Clause. *Hopi Indian Tribe*, 8 Indian L. Rep. at 3073-76. See *Wilson v. Block*, 708 F.2d at 747.<sup>3</sup>

It is thus apparent that there exists a clear line of authority inconsistent with the Ninth Circuit's ruling. That line of authority clearly demonstrates that government may not take action which restricts or denies public access to public land when that denial aids religious practices to the point that the government is involved in the establishment of religion. The Forest Service thus may not be enjoined from building the G-O Road.

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## CONCLUSION

For all practical purposes the District Court and the Ninth Circuit have made a gift of public lands to respondents for strictly religious purposes. If this precedent is allowed to stand, there could well be no end to the struggle for the dedication of other public lands to one religious

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<sup>3</sup> This reasoning was followed by the District Court of Alaska in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), where the court refused to extend Inupiat sovereignty over 65 miles of the Arctic Ocean, saying the "First Amendment may not be asserted to deprive the public of its normal use of an area." *Id.* at 189.



purpose or another. When the state goes beyond the mere incidental accommodation of religious practices and actually gives massive land subsidies or other aid to a particular religion, then it has strayed dangerously beyond the limits of religious neutrality enunciated by this Court. This Court should grant the government's petition for writ of certiorari.

DATED: January, 1987.

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# **JOINT APPENDIX**

(11)  
No. 86-1013

Supreme Court, U.S.

FILED

AUG 6 1987

JOSEPH R. SPANIOL, JR.  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD E. LYNG,  
SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI  
FILED DECEMBER 19, 1986  
CERTIORARI GRANTED MAY 4, 1987

284 pgs  
12/19/86



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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 83-3225

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NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, ET AL., PLAINTIFFS-APPELLEES

v.

R. MAX PETERSON, CHIEF, U.S. FOREST SERVICE, ET AL.,  
DEFENDANTS-APPELLANTS

---

STATE OF CALIFORNIA, PLAINTIFF-APPELLEE,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF  
AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS

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RELEVANT DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS
1983	
Aug. 5	Docketed cause and entered appearance of counsel.
1984	
July 9	Case argued and submitted before: Duniway, Canby, Beezer, CJJ.
1985	
June 24	Filed opinion – Affirmed in part and vacated in part. Filed and entered judgment.

DATE	FILINGS—PROCEEDINGS
Aug. 13	Filed as of 8/12 aplt's petition for rehearing and suggestion for rehearing en banc.
Oct. 22	Filed order (Duniway, Canby & Beezer) Aples Northwest Indian Cemetery Protective Assoc. are instructed to file a response to the petition for rehearing and suggestion for rehearing en banc. Aple State of CA., may also file a response to the petition if it so chooses.
1986	
July 22	Filed opinion—Vacated in part & affirmed in part (Beezer dissenting)

UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA

82-4049

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, ET AL., PLAINTIFFS

v.

R. MAX PETERSON, CHIEF, U.S. FOREST SERVICE, ET AL.,  
DEFENDANTS

Case filed 07/30/82

Consolidated with: 82-5943 SAW

DATE	EVENT
1982	
July 30	Complaint-summons issued.
Sept. 28	Answer to complaint by defendants.
Oct. 12	Defendants' administrative record filed.
Oct. 27	Indian Plaintiffs' motion for TRO & preliminary injunction and affidavits filed.
Dec. 7	Case consolidated with C-82-5943-SAW for trial.
Dec. 17	Order—that the motions of plaintiffs for a preliminary injunction are denied.
Dec. 27	Answer to complaint of State of California filed.
1983	
Apr. 1	Trial minutes filed.
May 24	Findings of Fact & Conclusions of Law filed.
May 25	Judgment filed.
May 31	Reporter's trial transcript filed.
July 22	Defendants' Notice of Appeal filed.



UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA

82-5943

STATE OF CALIFORNIA, PLAINTIFF,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF  
AGRICULTURE, ET AL., DEFENDANTS

RELATED TO: C-87-4049-SAW

DATE	EVENT
1982	
Oct. 27	Complaint filed. Application for temporary restraining order and order to show re: preliminary injunction filed with supporting declarations.
Oct. 29	Related case Order.—determined related to C-82-4049-SAW.
1983	
May 25	Judgment filed.
May 31	Reporter's trial transcript filed.
July 22	Defendants' Notice of Appeal filed.

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. \_\_\_\_\_

NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION,  
A NON-PROFIT CORPORATION; JIMMIE JAMES; SAM JONES;  
LOWANA BRANTNER; CHRISTOPHER H. PETERS; SIERRA  
CLUB, A NON-PROFIT CORPORATION; THE WILDERNESS  
SOCIETY, A NON-PROFIT CORPORATION; CALIFORNIA TROUT,  
A NON-PROFIT CORPORATION; SISKIYOU MOUNTAINS  
RESOURCE COUNCIL, AN UNINCORPORATED ASSOCIATION;  
REDWOOD REGION AUDUBON SOCIETY, AN UNINCOR-  
PORATED ASSOCIATION; NORTHCOAST ENVIRONMENTAL  
CENTER, A NON-PROFIT CORPORATION; TIMOTHY MCKAY;  
AND JOHN AMODIO; PLAINTIFFS,

v.

R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF,  
UNITED STATES FOREST SERVICE;  
JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY  
OF THE DEPARTMENT OF AGRICULTURE;  
UNITED STATES FOREST SERVICE; AND  
UNITED STATES OF AMERICA; DEFENDANTS.

**REVIEW OF ADMINSTRATIVE ACTION; CIVIL RIGHTS  
COMPLAINT FOR DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF**

Plaintiffs allege as follows:

**I. INTRODUCTION**

1. This is an action for a declaratory judgment and in-  
junctive relief challenging certain actions of the Forest  
Service in planning and approving road-building, clear-

cutting, and related development activities in a remote and wild portion of the Siskiyou Mountains in northern California known as Blue Creek. Blue Creek includes lands within the Six Rivers National Forest that are and have since ancient times been held sacred by indigenous Yurok, Karok and Tolowa Indian people, including some of the plaintiffs. These lands are the source of supernatural powers and spiritual purity and are the central prayer and religious training grounds for these people. Blue Creek is also highly valued by plaintiffs and others for its wilderness character and natural beauty, for the primitive recreational opportunities it provides, for the diversity and rarity of its wildlife and plant life, and for its exceptional anadromous fish habitat. Blue Creek, with its tributaries, is a primary fish producer for the Klamath River, which traverses the Hoopa Valley Indian Reservation. The Indians of the Reservation rely upon the fish of this river for their sustenance and cultural survival. The development activities planned by the Forest Service would unlawfully destroy Blue Creek as a religious place, depriving the Indian peoples of their ability to continue their traditional religious practices. Such activities would also unlawfully degrade and destroy the area's wilderness character and other natural resources. Moreover, the process by which the Forest Service decided to take the contested actions was unlawful in several respects.

2. This action arises under and alleges violations of the First Amendment of the United States Constitution; the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the federal trust obligations owed to American Indians; the federally reserved water and fishing rights of the Indians of the Hoopa Valley Indian Reservation; the National Historic Preservation Act, 16 U.S.C. §§ 470-470n; Executive Order No. 11593 (Protection and Enhancement of the Cultural Environment), 36 Fed. Reg. 8921 (1971),

16 U.S.C.A. § 470 note at 28 (West 1974); the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; the Forest and Rangelands Renewable Resources Planning Act, as amended by the National Forest Management Act, 16 U.S.C. §§ 1600-1614; the Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-531; the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*; the Porter-Cologne Water Quality Control Act, Cal. Wat. C. §§ 13000 *et seq.*; and regulations and Forest Service rules and policy directives issued pursuant to those laws.

## II. JURISDICTION AND VENUE

3. This Court has jurisdiction of this action by virtue of 28 U.S.C. §§ 1331 (action arising under the Constitution, laws, or treaties of the United States) and 1361 (mandamus to compel officer or employee of the United States to perform a duty owed the plaintiffs), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

4. Venue lies in this judicial district under 28 U.S.C. § 1391(e) because the subject property, the land known as Blue Creek, is located in this district in Del Norte County.

## III. PARTIES

5. Plaintiff Northwest Indian Cemetery Protective Association (NICPA) is a non-profit corporation organized and existing under the laws of the State of California with its principal place of business located on the Trinidad Rancheria in Humboldt County, California. Founded in 1970, NICPA is dedicated to protecting and preserving Indian burial grounds, ceremonial sites, and areas of religious, cultural, and historical importance to Indians of Northwest California. With an active membership of ap-



proximately 65 members comprised of Tolowa, Yurok, Karok, Hupa, and other Northwest California Indians, NICPA's primary area of interest is the tri-county region of Humboldt, Del Norte, and Siskiyou Counties, which includes the lands of Blue Creek. In furtherance of its purposes and the religious and cultural interests of its members, NICPA has assisted local Indian people in protecting places of special religious and cultural importance, and it has provided expertise to governmental and private entities in identifying ceremonial and religious sites and in evaluating the potential impact of proposed development of such places. NICPA has also pursued administrative appeals of the Forest Service decisions at issue in this case. Among the membership of NICPA are Northwest California Indians who use the Blue Creek traditional medicine lands, or rely upon those who use them for care and prayer. The disturbances planned by the Forest Service within the sacred lands of Blue Creek, including logging, road construction, and related activities, will defile the sacredness of the area and will impair the ability of local Indian peoples to maintain and practice their traditional religious beliefs. The religious and cultural interests of NICPA and its members will be gravely and irreparably injured by the proposed development of Blue Creek.

6. Plaintiff Jimmie James is a full-blooded Yurok-Hupa Indian from the Hoopa Valley Indian Reservation, born in 1914 near the mouth of the Klamath River. Plaintiff James, who has lived most of his life along the Klamath River, possesses and exercises federally reserved fishing rights. He depends upon the fishery of the Klamath River and its tributaries to sustain himself and his family and for ceremonial use. Plaintiff James believes in the sanctity of the Blue Creek medicine area, as have his ancestors, and is known among his people as a respected elder, learned in Yurok history and culture, and as a practitioner of traditional rites and ceremonies. For nearly

fifty years he has used the traditional medicine lands in Blue Creek as a place of prayer and source of spiritual power. The medicine area is an indispensable part of Jimmie James' system of religious belief and practice. The continuation of his indigenous beliefs and his continued use of the sacred area are dependent upon certain qualities of the physical environment of Blue Creek, the most important of which are an undisturbed natural setting, privacy, and silence. The proposed development activities in Blue Creek will gravely and irreparably injure plaintiff James.

7. Plaintiff Sam Jones is a full-blooded Yurok Indian at the Hoopa Valley Indian Reservation, born in 1913 at Martin's Ferry along the Klamath River. He possesses federally reserved fishing rights and has fished the Klamath River and its tributary creeks throughout his life for sustenance and ceremonial purposes. Plaintiff Jones participates in traditional ceremonies and believes in the sanctity of the Blue Creek medicine areas. He relies upon traditional practitioners whose sources of power and spirit come from Blue Creek to pray and care for himself and his family. The medicine areas of Blue Creek are an indispensable part of Sam Jones' indigenous system of religious belief and practice, and such system is dependent upon certain qualities of the physical environment of Blue Creek, the most important of which are an undisturbed natural setting, privacy, and silence. The proposed actions in Blue Creek will gravely and irreparably injure plaintiff Jones.

8. Plaintiff Lowana Brantner is a Yurok Indian born in 1908 at Mettah, a village located along the Klamath River on the Hoopa Valley Indian Reservation, where she still lives today. Plaintiff Brantner possesses and exercises federally reserved fishing rights on the rivers and tributaries of the Reservation. Plaintiff Brantner is a member of the Northwest Indian Cemetery Protective



Association, and she is recognized by her community as being learned in Yurok history, culture and traditional practices. She possesses one of the largest collections of regalia, which is used in religious ceremonies by her fellow tribal members. Plaintiff Brantner believes in the sanctity of the Blue Creek medicine areas and calls upon the Spirit and sources of powers of Blue Creek in regular prayer for herself and others. The medicine areas of Blue Creek are an indispensable part of Lowana Brantner's indigenous system of religious belief and practice, and such system is dependent upon certain qualities of the physical environment of Blue Creek, the most important of which are an undisturbed natural setting, privacy, and silence. The proposed development activities in Blue Creek will gravely and irreparably injure plaintiff Brantner.

9. Plaintiff Christopher H. Peters is a Yurok-Karok Indian who was born in 1949 at Weitchpec on the Hoopa Valley Indian Reservation. He was raised on the Reservation and possesses federally reserved fishing rights. As a youth plaintiff Peters often traveled into Blue Creek with the elders to learn of the spiritual qualities of the high country. Plaintiff Peters continues to use the Blue Creek area for spiritual and personal reflection and to strengthen and expand his cultural heritage. Plaintiff Peters participates in traditional ceremonies and believes in the sanctity of the Blue Creek medicine lands, and his continued use of the area is dependent upon certain qualities of the physical environment of Blue Creek, the most important of which are an undisturbed natural setting, privacy, and silence. The proposed development activities in Blue Creek will gravely and irreparably injure plaintiff Peters.

10. Plaintiff Sierra Club is a non-profit corporation organized and existing under the laws of the State of California since 1892, with its principal place of business in San Francisco, California. Sierra Club is a national conservation organization having approximately 314,000

members, of whom about 118,000 reside in California. The Redwood Chapter of the Sierra Club, which encompasses the coastal mountain region of California from Sonoma County to the Oregon border, including Blue Creek, has approximately 4,200 members. The stated corporate purposes of the Sierra Club include:

to explore, enjoy, and protect the wild places of the earth, to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment and to use all lawful means to carry out these objectives.

In furtherance of these purposes, the Sierra Club for many years has represented its members and persons similarly situated before the courts and administrative agencies of the state and federal governments.

11. Consistent with its above-stated purposes, the Sierra Club has been active since the 1960's in efforts to protect the wild character and wilderness qualities of the Siskiyou Mountains, including Blue Creek. These efforts have included gathering and disseminating information about the Siskiyou in order to educate the public and the Forest Service about the resources present; filing comments and otherwise participating in two nationwide roadless area reviews conducted by the Forest Service and in various other Forest Service planning processes affecting Blue Creek; and pursuing administrative appeals of the Forest Service decisions at issue in this case. Members of the Sierra Club use Blue Creek for aesthetic, conservation, and recreational purposes such as hiking, camping, nature study, photography, and spiritual regeneration. The Sierra Club strongly supports the right of Indian people to unimpaired use of the Blue Creek high country for spiritual purposes.

12. Plaintiff The Wilderness Society is a nonprofit corporation organized and existing under the laws of Washington, D.C., with its principal place of business in Washington, D.C. Founded in 1935, The Wilderness Society is dedicated to the establishment, promotion, and proper management of wilderness. It has approximately 60,000 members, approximately 14,000 of whom live in California.

13. In furtherance of its purposes, The Wilderness Society has played a significant role in public efforts to establish wilderness areas in California and, specifically, to protect the wilderness character of Blue Creek. Society representatives during the past few years have actively participated in negotiations in California, presented testimony to Congress, and otherwise worked toward enactment of a California wilderness bill to protect Blue Creek. Such legislation has now passed the House of Representatives. The Society has participated in Forest Service roadless area reviews and other planning processes affecting Blue Creek and has pursued administrative appeals of the Forest Service decisions at issue in this case. The Wilderness Society has approximately 5,000 members in northern California who have easy access to Blue Creek. These members and others from throughout the nation use this spectacular area for recreational, conservation, and aesthetic purposes, including backpacking, camping, fishing, and spiritual rejuvenation.

14. Plaintiff California Trout (CalTrout) is a nonprofit corporation organized and existing under the laws of the State of California with its principal place of business in San Francisco, California. CalTrout was formed in 1970 as a charitable and educational organization. It is dedicated to the protection and restoration of wild trout and native steelhead, and to the conservation and enhancement of trout habitat and of the ecological conditions conducive to and compatible with conservation and enhance-

ment of such habitat. CalTrout has approximately 1,600 members and is further supported by affiliated local angling clubs.

15. Since its inception, and in furtherance of its purposes, CalTrout has engaged in activities to protect the fishery resources of the Klamath River. Because Blue Creek is one of the richest and most productive tributaries of the Klamath River and one of only a few streams containing summer steelhead, CalTrout for years has been particularly concerned with the actual and potential degradation of Blue Creek. CalTrout has participated in various Forest Service planning efforts affecting Blue Creek and has pursued administrative appeals of the Forest Service decisions at issue in this case. Members of CalTrout use Blue Creek for fishing, hiking, and enjoyment of nature.

16. Plaintiff Siskiyou Mountains Resources Council is an unincorporated association with its principal place of business in Arcata, California. It has approximately 700 members, most of whom live in California and Oregon. The association was formed in January 1975 to promote the wise use and conservation of the resources of the Siskiyou Mountains located in Del Norte, Siskiyou, and Humboldt Counties of California.

17. Consistent with its purposes, the Siskiyou Mountains Resource Council has actively sought legislative and administrative protection for the Siskiyou Mountains, including Blue Creek, by participating in all relevant Forest Service planning meetings open to the public, preparing testimony for Congressional hearings on wilderness bills affecting the Siskiyou, participating in the recent Forest Service nationwide roadless area review, and pursuing administrative appeals of Forest Service decisions at issue in this case. Members of the Siskiyou Mountains Resource Council use Blue Creek for recreational activities such as hiking, camping, fishing, and hunting; for enjoyment of



the area's wilderness qualities, including its aesthetic, cultural, historical, and ecological values; and for rituals and pilgrimages of a spiritual nature.

18. Plaintiff Redwood Region Audubon Society (Audubon Society) is an unincorporated association with headquarters in Eureka, California. It was chartered as a chapter of the National Audubon Society in 1968 and is dedicated to promoting the study, appreciation and conservation of nature. The Audubon Society has approximately 550 members from all walks of life, including Indian members from the Hoopa Valley Indian Reservation.

19. In furtherance of its purposes, the Audubon Society sponsors an active program of field trips, publications, monthly meetings, and a nature film series for the enjoyment and education of members and non-members, with particular emphasis on the Six Rivers National Forest and other lands in northwest California. The Audubon Society has over the years participated in public involvement activities affecting management of Six Rivers National Forest; and it has been actively involved in matters affecting the Blue Creek area, including efforts to have the area designated as wilderness, participation in the Forest Service nationwide roadless area review, and pursuit of administrative appeals of the Forest Service decisions at issue in this case. Many members of the Audubon Society spend significant amounts of time in all parts of Six Rivers National Forest, including Blue Creek, engaging in recreational, conservation, and aesthetic pursuits including hiking, camping, hunting, fishing, swimming, photography, picnicking, and all forms of nature study.

20. Plaintiff Northcoast Environmental Center (NEC) is a non-profit corporation organized and existing under the laws of the State of California, with its principal place of business in Arcata, California. The Board of Directors is composed of a representative of each of ten

member organizations. The membership of NEC is approximately 4,000 persons (including members of member organizations as well as other individuals), of whom roughly two-thirds live in northwestern California. The stated purposes of NEC are:

to promote a better understanding of and solutions to environmental problems . . . [, the] collection and dissemination of information about the environment and information regarding projects . . . which will have an effect on the environment . . . and to attempt to prevent the creation of unnecessary environmental conditions deemed deleterious to human beings or to flora and fauna.

21. Consistent with these purposes, NEC has long held and demonstrated an interest in the wise use of the Blue Creek watershed and other sensitive lands in the Six Rivers, Klamath, and Shasta-Trinity National Forests of northwestern California. NEC's concern for Blue Creek reflects the diversity of its membership and the diversity of Blue Creek's special attributes. Some members are particularly concerned with preserving traditional Indian values and practices and therefore in preventing the desecration of the sacredness of Blue Creek; some members are particularly concerned with the unique, sensitive, and rare plants found in the Blue Creek watershed; some members are particularly concerned with preserving the diversity of plant and animal life found in the old growth forest of Blue Creek and in preserving the basic productivity of the land and water; and others are particularly concerned with protecting the important fishery in the Blue Creek watershed. NEC members have, accordingly, participated in both of the Forest Service's nationwide roadless area reviews, testified at public hearings on Forest Service plans for Blue Creek, provided written comments on relevant Forest Service planning documents, and traveled to Washington, D.C., to work for legislative protection for



Blue Creek. NEC maintains a large library of materials pertaining to the Siskiyou Mountains, including Blue Creek, and regularly gathers and publishes information on plans and proposals for these areas. NEC has pursued two Forest Service administrative appeals regarding plans for Blue Creek, and several member organizations of NEC pursued administrative appeals of the Forest Service decisions at issue in this case. Members of NEC use the Blue Creek watershed for a wide range of spiritual, aesthetic, conservation, and recreational activities including prayer, scientific study, photography, fishing, hiking, and camping.

22. Plaintiff Timothy McKay is a resident of Trinidad, California, and a member of the Sierra Club, the California Native Plant Society, and other conservation organizations. He is also the Coordinator of the Northcoast Environmental Center. Mr. McKay has in the past hiked and camped extensively in the Blue Creek watershed for purposes of spiritual fulfillment, solitude, nature study, and recreation. He intends to continue these pursuits in Blue Creek in the future if the area remains in its wild and remote condition. Mr. McKay pursued administrative appeals of the Forest Service decisions at issue in this case.

23. Plaintiff John Amodio resided in Humboldt County for several years prior to 1981 and now resides in San Francisco, California. He is a member of the Sierra Club and other conservation organizations. Mr. Amodio has in the past visited and explored the Blue Creek watershed because of its exceptional beauty, biological diversity, and the undefinable quality which makes it a spiritual place. He has used the area for hiking, botany study, nature photography, and psychological and spiritual rejuvenation, and he will continue to do so if the area remains in its wild and remote condition. Mr. Amodio has worked actively to preserve Blue Creek since approximately 1974, giving public testimony on several occasions,

writing letters to the general media and to elected officials, and pursuing administrative appeals of the Forest Service decisions at issue in this case.

24. The above-described Indian, religious, cultural, aesthetic, conservation, spiritual, recreational, educational, and scientific interests of plaintiffs and of the members of the plaintiff organizations will be adversely affected and irreparably injured by the drastic alteration of Blue Creek's naturalness, remoteness, beauty, and ecology through extensive roading and logging activities proposed by defendants, as is more fully described below.

25. Defendant R. Max Peterson is Chief of the United States Forest Service, an agency within the United States Department of Agriculture. He is sued in his official capacity. The Forest Service has responsibility for management of lands in the National Forests, including the Six Rivers National Forest wherein Blue Creek is located, and defendant Peterson has responsibility for the administration of the Forest Service. As an officer of the United States, he has the responsibility of fulfilling trust and fiduciary obligations of the United States to the Indian plaintiffs in this proceeding. Defendant Peterson made the final administrative decisions at issue in this case.

26. Defendant John R. Block is sued in his official capacity as Secretary of the United States Department of Agriculture. As such, he is responsible for the administration of the activities of the Forest Service. Defendant Block is authorized to make such rules and regulations as are needed to govern the use, occupancy, and conservation of the National Forests; and as an officer of the United States he has the responsibility of fulfilling trust and fiduciary obligations of the United States to the Indian plaintiffs in this proceeding. Defendant Peterson had discretionary authority to review the final administrative

decisions of defendant Peterson that are at issue in this case. He did not exercise such authority to alter the decisions of defendant Peterson.

27. Defendant United States Forest Service is an agency of the United States within the Department of Agriculture. The agency has various duties and responsibilities, including proper management of the National Forests and fulfillment of the United States' trust and fiduciary obligations to the Indian plaintiffs in this case.

28. Defendant United States of America is a sovereign nation having certain duties and obligations, among them certain trust and fiduciary obligations to the Indian plaintiffs in this case.

#### IV. GENERAL ALLEGATIONS

##### A. The Resources and Significance of Blue Creek

29. The Six Rivers National Forest (the Forest) is located in northwest California not far from the Pacific Coast. It encompasses approximately 965,000 acres of generally rugged mountainous terrain and is located within the aboriginal territories of the Tolowa, Karok, Yurok, and Hupa Indian tribes. The Forest is divided for administrative purposes into several Ranger Districts. The Orleans Ranger District includes several forks of Blue Creek, which meet and flow into the Klamath River. The subwatersheds containing three of these forks, from their headwaters to their confluence, together form a roadless and undeveloped tract of land of about 31,000 acres known generally as the Blue Creek roadless area, or simply Blue Creek.

30. Blue Creek is precipitous, with elevations ranging from about 1,200 feet to nearly 6,000 feet. The higher elevations form part of the crest of the southernmost end of the Siskiyou Mountains. From this high country the waters of Blue Creek gather and plummet through valleys

of virgin forest to their confluence at Bear Pen Flat. Landslide features are the most prominent landform in this mountainous country, and landslide activity is increased by heavy rainfall (averaging 110 inches a year), weak rock along numerous fault zones, and steep slopes. The streams of Blue Creek contain excellent spawning and rearing habitat for anadromous salmon and trout, accounting for nearly five percent of the anadromous fish production of the Klamath River. Blue Creek is one of the few streams containing habitat for the rare and sensitive summer steelhead.

31. Blue Creek is forested mainly with old growth Mixed Evergreen Forest, broken occasionally by small wet meadows and dry grasslands that provide a diversity of wildlife habitat. Although much of the forest is lush, soil productivity is generally low. The area is rich in endemic and relict plant species because it forms a transition between the Northern Coniferous Forest and the Broad-Sclerophyll Vegetation of California. Several species of plants found in Blue Creek are classified as rare or sensitive. Because of its remoteness and old growth forest, Blue Creek contains important habitat for wildlife species that have retreated from surrounding lands as man has intruded and the old growth forests have been clearcut. Such wildlife species include the spotted owl, pileated woodpecker, marten, fisher, and wolverine. Black bear is the most abundant game species.

32. Surrounding the valleys of Blue Creek to the west, south, and east, the landscape is dominated by the checkerboard pattern of clearcuts and the visual scars of road cuts and fills. Blue Creek remains a remarkable haven of wilderness and natural beauty within this highly transformed region. Though small, Blue Creek is shielded from the outside world by an unusual arrangement of ridges. It thus retains an exceptional wilderness character.



33. The Blue Creek area, with its attributes of remoteness and wildness, is an integral and indispensable part of the religious beliefs and practices of the Yurok, Karok and Tolowa Indians who inhabit the surrounding region. To them, Blue Creek is the sacred "high country," the medicine land that serves as the training ground for doctors and spiritual leaders. It is and has since ancient times been the source of supernatural power for those individuals who use the sacred area for personal medicine and spiritual growth, curing medicine, and protection of the well-being of the local community and the world at large.

34. To the Indians involved, the Blue Creek high country in its entirety possesses a generalized sanctity which is indispensable for the proper exercise of the religious practices associated with the region. The high country is dotted by a multitude of sacred sites, locales, rock cairns, prayer seats, and trails, including the Golden Stairs Trail which climbs from the confluence of the forks of Blue Creek to the crest of the high country at Peak 8. Within the religious belief system of the affected Indians, such locales as Doctor Rock, Chimney Rock, and Peak 8 form a geographic hierarchy of power which is correlated with the progress of the individual practitioner's quest for power through the high country. A seeker of power progresses through sites of increasing power and aspires to the use of the most powerful locales. Because of this generalized use, practitioners regard the high country itself, with its privacy and pristine environment, as sacred and integrally connected with, and vital to, their use of the specific power locales.

35. Blue Creek is also vital to the subsistence and culture of local Indian peoples. Since long before the establishment of the Hoopa Valley Indian Reservation, the Indians for whom that Reservation was set apart were dependent upon the anadromous fish of the Klamath-Trinity Rivers and their tributaries for their subsistence,

for traditional ceremonial activities, and for trade with other tribes and later settlers. Among the most important fish-producing tributaries was and is Blue Creek, which enters into the Klamath River within the boundaries of the Reservation.

36. When the lands which became the Hoopa Valley Indian Reservation were set aside and reserved for the Indians, the United States also guaranteed and reserved for the Indians hunting, fishing and water rights. The Indians reserved the right to sustain themselves and maintain their culture and physical well-being by fishing the Klamath-Trinity River system. They also reserved unto themselves and their descendants, including Indian plaintiffs herein, a sufficient quantity and quality of water within the Blue Creek watershed to maintain the fish and game population of the Reservation and the concomitant right to protect the fishery resources from degradation.

#### **B. Forest Service Plans for Blue Creek**

37. As of 1969, and perhaps earlier, Forest Service management direction for Blue Creek was set forth in the Orleans Ranger District Multiple Use Plan prepared pursuant to the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531. That direction was to maintain Blue Creek in a natural condition in order to protect fish habitat, scenic values, and opportunities for primitive recreational experiences. Development was limited to trails and rustic recreation facilities, and timber cutting was limited to salvage or hazard tree removal.

38. Early in the 1970's the Forest Service began to review and update its Ranger District multiple-use plans and to prepare public documents reviewing the environmental impacts of management plans and proposals in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*). Accordingly, in or about 1972 the Forest Service designated some 96,500



acres in the Gasquet and Orleans Ranger Districts of the Six Rivers National Forest as the Eightmile and Blue Creek Planning Units, respectively, and began to prepare a single multiple-use management plan and environmental impact statement for management of these lands. The Blue Creek Planning Unit consisted of approximately 67,500 acres, including the Blue Creek roadless area and some lands to the south and west that had already been developed (roaded and logged); the Eightmile Planning Unit consisted of approximately 29,000 acres, including primarily roadless and undeveloped lands lying immediately north of the Blue Creek roadless area, and also some developed lands to the west.

39. The Forest Service drew the boundary between the Eightmile and Blue Creek Units along an east-west ridge-top that forms an obvious topographic divide between the watersheds of Blue Creek and Eightmile Creek. This ridge is remarkable for several prominent landforms, including Peak 8 and Chimney Rock. It forms the culmination of the high country that is the sacred land of local Indian people, including the Indian plaintiffs.

40. The Eightmile and Blue Creek Planning Units lie between two halves of a high-standard road (a wide, paved road capable of handling large logging trucks and other traffic at fairly high speeds), which the Forest Service began constructing in the 1960's. The two sections of the road, if joined, would link the towns of Gasquet, in Del Norte County, and Orleans, in Humboldt County. This route has come to be known as the Gasquet-Orleans Road, or "G-O Road."

41. The G-O Road has been constructed over the years in segments, working from both ends toward the middle. Each new segment has created or improved access to surrounding timberland, and thus has had and continues to have independent utility.

42. The two existing halves of the G-O Road would be joined if another approximately seven to 10 miles of road were built. The shortest route would lie on or near the ridge demarcating the boundary between the Eightmile and Blue Creek Units and would cut through the heart of the sacred high country. This potential route is referred to as the "Chimney Rock section of the G-O Road." There is presently a primitive, unpaved jeep road not passable by highway-type vehicles that roughly follows the ridge from one side of the Blue Creek and Eightmile Units to the other.

43. On or about May 20 1975, the Forest Service filed a document entitled "Final Environmental Statement: Eightmile and Blue Creek Units" (Unit Plan FES) which purported to be an environmental impact statement prepared pursuant to the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) on a proposed multiple-use management plan for the Eightmile and Blue Creek Planning Units. The Unit Plan FES presented alternatives for management of the Units which focused primarily on how much of the units should be devoted to intensive timber harvesting. Under all the alternatives, other than "no action," clearcutting in blocks of 25 to 40 or more acres would be the primary methods of logging, and a dense network of roads would be constructed to allow the clearcutting. The FES also addressed whether the Chimney Rock section of the G-O Road should be built. The Unit Plan FES indicated a preferred alternative: commitment of all of the Eightmile and Blue Creek roadless areas, along with the already-developed portions of the Units, to intensive roading and logging; construction of the Chimney Rock section of the G-O Road; and further study of four isolated "Indian Cultural Sites" (totaling 205 acres) for potential nomination to the National Register of Historic Places.

44. On October 19, 1976, the Forest Supervisor for the Six Rivers National Forest adopted a management plan based on the Unit Plan FES. The decision was deemed a modification of the preferred alternative (Alternative E) as presented in the Unit Plan FES. The decision eliminated the Eightmile roadless area from the Eightmile Unit and directed that the rest of the Eightmile Unit be treated as part of the Blue Creek Unit. The Blue Creek Unit, in turn, including the Blue Creek roadless area, was to be committed to intensive roading and logging. Specifically, the Forest Service authorized the construction of some 200 miles of road over 80 years, more than 150 miles within the first ten years, and the harvesting of 116 million board feet of timber each decade for 80 years, primarily through clearcutting. The Forest Supervisor at this time deferred any decision on whether to construct the Chimney Rock section of the G-O Road on the ground that the Forest Service had not developed adequate information on Indian use of the area.

45. Implementation of the Blue Creek Unit Plan will have devastating impacts on the natural resources of the Blue Creek roadless area and on the attributes that have made it a sacred place since ancient times. Clearcutting and construction of a dense network of roads will destroy the natural beauty and remoteness of Blue Creek, eliminating the old growth forest and vegetative diversity that are essential to its visual character. Wildlife dependent on remoteness and on the unique ecology of old growth forests will also disappear. Clearcutting and road building will trigger mass erosion (landslides) and irreversible loss of topsoil that will cause permanent damage to the productivity of the land, will gravely disrupt watershed equilibrium, and will, through scouring of stream channels and sedimentation of streambeds, cause essentially permanent loss of a significant portion of the anadromous fish habitat in the Blue Creek watershed. Opportunities

for high-quality primitive recreation—hunting, fishing, hiking, and seeking the quiet and solitude of wilderness—will all but be eliminated.

46. Furthermore, implementation of the Blue Creek Unit Plan will severe and irreparable impacts on the ability of the Yurok, Karok, and Tolowa Indians, including the Indian plaintiffs, to continue their indigenous religious practices. These impacts are not a matter of debate. They have been confirmed by thousands of hours of anthropological analysis and Indian testimony. Researchers who conducted a comprehensive field study for the Forest Service on the religious and cultural importance of Blue Creek concluded:

[P]ristine visual and aural conditions are salient attributes of the medicine quests undertaken in this sacred area. . . . [I]ncreased intrusion into this sacred region would adversely affect the ability and/or success of the individual's quest for spiritual power. . . . [T]he spiritual, moral, and physical viability of the practitioner's home community will be diminished in proportion to the diminished ability of that practitioner to seek and attain power within the high country. . . . [T]he Indian concept of World Renewal is inextricably related to religious practice in the high country. Intrusions on the sanctity of the Blue Creek high country are therefore potentially destructive of the very core of Northwest religious beliefs and practices.

Theodoratus, *et al.*, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (U.S.D.A., Forest Service, 1979) at 419-20.

47. On or about October 25, 1976, a coalition of individuals and organizations (hereafter "Blue Creek appellants"), including most of the plaintiffs, appealed the Forest Supervisor's October 19, 1976, decision to adopt the Blue Creek Unit Plan to the Regional Forester, the



Forest Service officer in charge of all national forests in the Pacific Southwest Region of the Forest Service (California).

48. More than four years passed before the Regional Forester decided the appeal. The long delay was in no way attributable to any actions or failures to act by the Blue Creek appellants. The Regional Forester simply chose not to decide the appeal until February 19, 1981, on which date he issued a decision denying the appeal and affirming the decision to manage Blue Creek according to the Blue Creek Unit Plan.

49. On or about March 21, 1981, the Blue Creek appellants appealed the Regional Forester's February 19, 1981, decision to the Chief of the Forest Service, defendant Peterson.

50. While the appeal to the Chief was pending, on or about May 21, 1981, the Secretary of the Interior listed on the National Register of Historic Places several thousand acres of land in the sacred high country of Blue Creek. The area was listed as the "Helkau District" pursuant to the National Historic Preservation Act, 16 U.S.C. § 470a, implemented through 36 C.F.R. Part 60, in recognition of its ancient and continuing ideological and spiritual value to the Yurok, Karok, and Tolowa Indians.

51. The Regional Forester filed a reply to the appeal of the Blue Creek appellants on or about July 29, 1981, directing the Forest Supervisor to prepare an "implementation plan for the development of Blue Creek" to provide, among other things, "updated statistical information developed during recent studies." Pursuant to this direction, on or about August 14, 1981, the Blue Creek appellants received from the Forest Supervisor a copy of a document entitled "Blue Creek Unit Implementation Plan, Alternative E" dated June 1981.

52. This "Implementation Plan" constituted a significantly different plan from the one approved in 1976

by the Forest Supervisor and in 1981 by the Regional Forester based on the 1975 Unit Plan FES. It still called for intensive roading and logging over the entire Unit, primarily through clearcutting, but it reduced the projected timber output by nearly 21% and moved considerable acreage from one "resource management zone" to another. It also identified six new "Native American Contemporary Use Areas" consisting of isolated sites within the sacred high country. All of the changes in the plan were said to be based on studies and data more recent than the 1975 Unit plan FES. However, the document included no updated environmental analysis, no updated analysis of the benefits and costs of developing Blue Creek, and no mention of the Helkau District.

53. On or about November 17, 1981, defendant Peterson issued his decision denying the appeal of the Blue Creek appellants. He also directed the Forest Supervisor to issue a new decision document adopting the 1981 "Implementation Plan" as the agency's management plan for the Blue Creek Unit. In accordance with these instructions, the Forest Supervisor on or about January 8, 1982, issued a Record of Decision adopting the Implementation Plan as the management plan for the Blue Creek Unit.

54. Defendant Peterson's decision and the Forest Supervisor's action referred to in paragraph 53 above constitute final agency action on the Blue Creek Unit Plan.

55. On or about March 2, 1982, the Forest Service issued a second environmental impact statement, this one devoted solely to the proposed construction of the Chimney Rock section of the G-O Road, entitled "Final Environmental Statement: Gasquet-Orleans Road (Chimney Rock Section)" (hereafter Chimney Rock FES) and a document entitled Record of Decision signed by the Regional Forester. The Record of Decision declares that the Forest Service adopts Alternative D(4) as presented in the Chimney Rock FES and will accordingly construct



the Chimney Rock section of the G-O Road as a high-standard paved road traversing the Blue Creek Unit just slightly below the crest of the ridge that separates the Blue Creek and Eightmile watersheds. (See paragraph 39 above.) The selected route runs through the hearts of the sacred high country and the Helkau District.

56. If the Chimney Rock section of the G-O Road is constructed in accordance with the Regional Forester's decision, it will have devastating impacts on the religious beliefs and practices of local Indian people. The sacredness of the high country is inseparable from the qualities of remoteness, quiet, wilderness, and natural beauty that characterize Blue Creek. These characteristics would be destroyed by the Road and its users. For example, construction of the Chimney Rock section would bring the noise and pollution of heavy traffic into the high country, with projected seasonal use of the Chimney Rock section exceeding 160 logging trucks and other non-recreational vehicles per day.

57. Furthermore, the Road, with its cuts and fills, will cause erosion that will damage the headwaters of Blue Creek. The Road will sever the Blue Creek roadless area from the roadless lands to the north and will facilitate the roading and logging called for by the Blue Creek Unit Plan.

58. On or about April 7, 1982, the Blue Creek appellants and additional plaintiffs in this action initiated an appeal to the Chief, defendant Peterson, of the Regional Forester's March 2, 1982, decision to construct the Chimney Rock section of the G-O Road. On or about July 26, 1982, defendant Peterson denied the appeal and affirmed the decision to construct the Chimney Rock section of the G-O Road. His decision constitutes final agency action.

59. On or about May 27, 1982, the Forest Service announced that it will accept bids from private companies

for construction of the Chimney Rock section of the G-O Road until August 3, 1982. That date subsequently was changed to August 17, 1982. Plaintiffs are informed and believe, and therefore allege, that, unless enjoined by this Court, the Forest Service will award a contract for road construction soon after August 17, 1982, and that the Forest Service expects right-of-way clearing, grading, and other work on the road to commence in the fall of 1982.

60. The Forest Service justifies its decision to construct the Chimney Rock section of the G-O Road primarily on economic grounds. Its rationale for building the road assumes that the old growth forest in Blue Creek will be logged off and will mostly be hauled over the Chimney Rock section of the G-O Road. The Forest Service's decisions on the Blue Creek Unit Plan and on the Chimney Rock section are therefore inseparable. The effects of implementing these decisions are cumulative and are described in paragraphs 45, 46, 56 and 57 above.

61. Unless construction of the Chimney Rock section of the G-O Road and implementation of the Blue Creek Unit Plan are enjoined, plaintiffs will be severely and irreparably injured. Plaintiffs have no adequate remedy at law.

#### IV. FIRST CLAIM FOR RELIEF: VIOLATION OF FIRST AMENDMENT RIGHTS OF INDIAN PLAINTIFFS TO PRACTICE THEIR RELIGION

62. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 61 above.

63. The First Amendment to the Constitution of the United States guarantees to all citizens, including Indian plaintiffs and their fellow Yurok, Karok, and Tolowa believers, the right to freely exercise their religion without government interference.

64. Plaintiffs allege, and the Forest Service acknowledges, that "there is no doubt that the Blue Creek

Area is important to Indian religious beliefs and practices—and [that] these beliefs are sincere.” (Regional Forester’s Responsive Statement, June 10, 1982.)

65. Blue Creek is much more than a place which is important to Indian believers. Since long before the drafting of the First Amendment, Blue Creek has been the physical and spiritual touchstone of Northwest California Indian religious belief—a system of belief and practice which is absolutely dependent upon the continued naturalness of the area.

66. Blue Creek is quite literally the last remaining temple or cathedral in which Indian believers of this region can engage in religious practices as they were meant to be performed. Unlike a temple or cathedral, Blue Creek cannot be reconstructed at a different locale.

67. The Forest Service’s proposed development of Blue Creek will have irreparable and devastating impacts upon the religious lands in the Blue Creek high country and the practices associated with them. The proposed road construction, logging operations, and other attendant activities will rob Indian plaintiffs and Northwest California Indians of their most important place of worship, irrevocably denying them the ability to continue the exercise of traditional religious beliefs and practices in violation of the First Amendment of the United States Constitution. This planned desecration of the high country is “potentially destructive of the very core of Northwest religious beliefs and practices.”

#### **V. SECOND CLAIM FOR RELIEF: VIOLATION OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT**

68. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 67 above.

69. In August 1978 the American Indian Religious Freedom Act, 42 U.S.C. § 1996, became law. The Act states:

That henceforth it shall be the policy of the United States to protect and preserve for Native Americans their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiian, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonial and traditional rites.

70. In order to carry out the Congressional intent of the Act, the environmental integrity of the sacred sites must be preserved. The sanctity of the Blue Creek area is a product of its homogeneity and would be demeaned and desecrated by any environmental degradation of the area.

71. Defendant’s proposed activities in Blue Creek will constitute active infringement on the rights of Indian plaintiffs to believe, express, and exercise their traditional religions and will constitute a denial of access to sites essential to the practice of their religions.

#### **VI. THIRD CLAIM FOR RELIEF: VIOLATION OF RESERVED FISHING AND WATER RIGHTS**

72. Plaintiffs incorporate by reference allegations set forth in paragraphs one through 71 above.

73. Pursuant to its Constitutional powers and obligations to the Indians of the region, the United States, by Acts of Congress and the Executive beginning with the Act of March 3, 1853 (10 Stat. 238), and culminating with the Executive Order of October 16, 1891, set aside the Hoopa Valley Indian Reservation, including the first 50 miles of the Klamath River and a substantial segment of the Trinity River.

74. When the United States reserved to the Indians the lands which became the Hoopa Valley Indian Reservation,



it also reserved for the Indians hunting, fishing and water rights, including the right of the Indians to have the spawning streams of the Klamath River, including Blue Creek, remain in a state which would allow the continued propagation of the anadromous and other fish native to these streams.

75. In their exercise of a reserved right to a sufficient quality and quantity of water from Blue Creek, the Indians of the Reservation, including Indian plaintiffs, used and use water from Blue Creek for numerous beneficial purposes, including but not limited to recreation and fishery.

76. The special and unique right of Indians, including Indian plaintiffs, to utilize the fishery resources of the Klamath and Trinity River system continues to be recognized and protected by the United States of America. (See 25 C.F.R. Part 250.)

77. The United States, having reserved to the Indians special fishing and water rights, may not abrogate these rights except by express Act. Congress has not expressly or impliedly abrogated these rights, which are superior to and paramount to any right the United States may have to exploit and degrade the Blue Creek watershed.

78. The water and fishing rights of the Indians of the Reservation protect the Indians from degradation of the anadromous fish spawning habitat of one of the Reservation's most important fishery streams.

79. The proposed logging, road construction and related activities in Blue Creek, and the adverse impacts therefrom upon the water quality and fish resources and habitats of the Klamath River and Blue Creek watersheds, will deprive the Indian plaintiffs of their right to derive sustenance from Reservation waters. They will be unable to utilize their Reservation for the Indian purposes for which Congress authorized its creation.

#### **VII. FOURTH CLAIM FOR RELIEF: VIOLATION OF FEDERAL TRUST RESPONSIBILITY**

80. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 79 above.

81. A trust relationship between the United States and Indian plaintiffs exists. The United States and its agencies and officials, including all defendants herein, are required, in the performance of the fiduciary obligations arising from this trust, to exercise the highest degree of diligence, care, skill, and loyalty; to protect and preserve Indian properties and rights, including reserved water, fishing, and religious rights of the Indian plaintiffs; and to make possible the continued enjoyment of these properties and rights by the Indian beneficiaries.

82. The actions proposed in Blue Creek by the defendants will constitute a violation of this trust relationship. The allowance of and direct participation of the United States in acts which will adversely affect the fishery resources of the Hoopa Valley Indian Reservation and adversely impact the religious rights of the Indians of the Reservation are in direct violation of the duty of the United States, its agencies and officials, to protect the water, fishery and other rights of the Indians of the Hoopa Valley Indian Reservation, including the Indian plaintiffs.

#### **VIII. FIFTH CLAIM FOR RELIEF: VIOLATION OF NATIONAL HISTORIC PRESERVATION ACT AND EXECUTIVE ORDER 11593**

83. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 82 above.

84. The National Historic Preservation Act, 16 U.S.C. §§ 470-470n, requires each federal agency to take into account the effects of federal actions, or undertakings, upon properties included in or eligible for inclusion in the National Register of Historic Places. (16 U.S.C. § 470f.)



When such effects may exist, the agency must initiate a consultation with the Advisory Council on Historic Places. (*Id.*).

85. Executive Order 11593 of May 13, 1971, 36 Fed. Reg. 8921 (1971), 16 U.S.C.A. § 470 note at 28 (West 1974), sets forth the responsibility of federal agencies under the National Historic Preservation Act. Regulations in 36 C.F.R. Part 800 set forth the procedures for the protection of historic and cultural properties to be followed by the Forest Service and other federal agencies when dealing with historic places.

86. The Helkau Historic District described in paragraph 50 above is entitled to the protection of the above-mentioned laws and regulations.

87. The 1981 Implementation Plan adopted by the Forest Service as the Blue Creek Unit Plan and described in paragraphs 51-53 above authorizes activities which will adversely affect the Helkau Historic District. The Forest Service was required to comply with the National Historic Preservation Act, Executive Order 11593, and the procedures set forth in 36 C.F.R. Part 800 in deciding to adopt the Implementation Plan in order to provide the Helkau Historic District with the protection it is entitled to under the law.

88. Defendants have failed to initiate the mandated review and consultation process with the State Historic Preservation Officer and the Advisory Council on Historic Preservation and thereby are in violation of the National Historic Preservation Act, Executive Order 11593, and the regulations promulgated pursuant thereto.

**IX. SIXTH CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL  
ENVIRONMENTAL POLICY ACT**

89. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 88 above.

90. Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), and the regulations of the Council on Environmental Quality, 40 C.F.R. Parts 1500-1508 (CEQ Regulations), require federal agencies to prepare a "detailed statement" on the potential environmental impacts of any proposed major Federal action significantly affecting the quality of the human environment. Such a statement is referred to as an "environmental impact statement" or "EIS." It must examine the direct, indirect, and cumulative effects of the proposed action; must be based on accurate, high quality scientific information and analysis; and must discuss alternatives to the proposed action.

91. CEQ Regulations require that a federal agency prepare a supplement to an EIS if the agency makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 CFR § 1502.9(c)(1). Such a supplement must be prepared, circulated, and filed in the same manner as a draft and final EIS. 40 CFR § 1502.9(c)(4).

92. Section 102(2)(E), 42 U.S.C. § 4332(2)(E), requires each agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." CEQ Regulations reinforce these requirements. 40 C.F.R. § 1502.14.

93. Defendants have violated the aforementioned provisions of NEPA and the CEQ Regulations in a number of respects, including at least the following:

a. Defendants failed to prepare, circulate and file a supplement to the 1975 Unit Plan FES before adopting in 1981 the "Blue Creek Implementation Plan" as the Blue Creek Unit Plan. A supplement was necessary because the

1981 plan was never discussed or evaluated as an alternative in the 1975 FES; because the 1981 plan constituted a substantial change in the proposed action relevant to environmental concerns; and because significant new circumstances and information developed in the six years between 1975 and 1981 that are relevant to environmental concerns and bear on the impacts of the proposed development of Blue Creek. Defendants' failure to prepare a supplemental EIS wrongly denied the agency and the public of the right to a complete and accurate assessment of the environmental impacts of defendants' proposed action.

b. Despite the preparation of two EIS's, defendants failed to accurately or adequately disclose the direct, indirect, and cumulative adverse impacts of roading and logging activities on (1) the non-timber resources of Blue Creek, including the soil, water, watershed, fish, wildlife, visual and recreational resources; (2) the long-term productivity of the land for timber production as well as other uses; (3) the religious beliefs and practices of the Yurok, Karok, and Tolowa Indian peoples; or (4) the Helkau District.

c. The two EIS's prepared by the Forest Service fail adequately to address the wilderness values of Blue Creek, the appropriateness of wilderness designation pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-1136, or the impacts of the proposed actions on the wilderness management option, and, in particular, failed to consider the wilderness value of Blue Creek as part of a much larger potential wilderness area including the Blue Creek and Eightmile roadless areas and contiguous roadless and undeveloped lands to the north in the Siskiyou Mountains.

d. The two EIS's each fail to recognize the depressed condition of the anadromous fish stock of the Klamath-Trinity River System (including past destruction of fish habitat in the West Fork of Blue Creek), to evaluate the relationship of the presently undamaged Blue Creek

fishery habitats to that system, and to assess the impacts of development of Blue Creek on the future of anadromous species in Blue Creek and in the larger River System.

e. The EIS's fail to disclose the cumulative adverse effects on Blue Creek of road building and logging impacts that cannot be fully mitigated and also fail to disclose the degree of risk that projections about impacts and the efficacy of mitigation measures are not accurate.

f. The Unit Plan FES significantly overestimates the volumes and value of timber that could be harvested over time while undervaluing other resources, rendering the Unit Plan FES analysis of costs and benefits of various alternatives highly inaccurate and inadequate as a basis for selecting a unit plan either in 1976 or 1981. Similar problems of over-reliance on faulty assumptions built into a benefit/cost analysis infect the Chimney Rock FES.

g. Defendants failed to present and evaluate in either EIS reasonable alternatives for management of Blue Creek that would better accommodate its unique resources and values than the plan chosen by the Forest Service. Such reasonable alternatives include, but are not limited to, the alternative of harvesting timber on other areas of the Six Rivers National Forest outside the Blue Creek roadless area as a trade-off for not logging Blue Creek; and the alternative of logging in Blue Creek using only minimum-impact silvicultural and logging systems, such as uneven-aged management and helicopter yarding, that would retain the area's essentially natural and undisturbed character, minimize watershed impacts, and avoid the visual scars of clearcuts and roads while achieving some timber output.

h. Defendants did not, prior to adopting the 1981 Blue Creek Implementation Plan or at any time study, develop, and describe, and they still have not studied, developed, and described, appropriate alternatives to their



proposed activities in Blue Creek, in violation of section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E).

**X. SEVENTH CLAIM FOR RELIEF: VIOLATION OF  
THE MULTIPLE USE, SUSTAINED YIELD ACT**

94. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 93 above.

95. The Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-531, requires that the national forests be managed for multiple use and sustained yield of all forest resources, including outdoor recreation, range, timber, watershed, wildlife and fish. The Act directs, among other things, that "due consideration shall be given to the relative values of the various resources in particular areas" (16 U.S.C. § 529), and requires

harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(16 U.S.C. § 531(a).)

96. In deciding to intensively road and log Blue Creek and to construct the Chimney Rock section of the G-O Road, defendants have violated these requirements by giving overwhelming consideration to the short-term dollar value of logging off the old growth forest of Blue Creek and failing to give sufficient and appropriate consideration to the long-term value of maintaining and protecting the fish, wildlife, watershed, soil, aesthetic, recreational, vegetational, historic, religious, and cultural resources of Blue Creek.

97. Implementation of Forest Service plans for intensive development of Blue Creek will sacrifice non-timber

resources for the sake of timber production, contrary to the requirement of "harmonious and coordinated management of the various resources, each with the other"; will impair the productivity of the land and water resources of Blue Creek; and will fail to provide for a sustained yield of all the forest resources, all in violation of the requirements of the Multiple Use, Sustained Yield Act.

**XI. EIGHTH CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL FOREST  
MANAGEMENT ACT**

98. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 97 above.

99. The Forest and Rangelands Renewable Resources Planning Act, as amended by the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614, sets forth in 16 U.S.C. § 1604 various standards and guidelines for management of the National Forests that must be incorporated in forest management plans "as soon as practicable." (16 U.S.C. § 1604(c).) Until such standards and guidelines are incorporated into plans for a particular unit of the national forests, management of such unit "may continue under existing land and resource management plans." (16 U.S.C. § 1604(c).)

100. The Blue Creek Unit Plan that the Forest Service proposes to implement is not an "existing plan" within the meaning of 16 U.S.C. § 1604(c), nor does it comply with the management standards and guidelines of 16 U.S.C. § 1604. Therefore, it would be unlawful for the Forest Service to implement the unit plan or to construct the Chimney Rock section of the G-O Road in reliance thereon.

101. The activities called for in Blue Creek by the Blue Creek Implementation Plan would violate many of the standards and guidelines set forth in the NFMA, 16 U.S.C. § 1604, and would therefore be unlawful. Such



standards and guidelines include requirements that all multiple uses be coordinated (16 U.S.C. § 1604(e)(1)); that forest management systems and harvest levels and procedures be selected to enhance multiple-use, sustained-yield management (16 U.S.C. § 1604(e)(2)); that diversity of plant and animal communities be maintained (16 U.S.C. § 1604(g)(3)(B)); that timber be harvested only where prompt regeneration is assured and fishery, soil, and watershed values will not be damaged (16 U.S.C. § 1604(g)(3)(E)); that clearcutting be used only where it is the optimum method (16 U.S.C. § 1604(g)(3)(F); and that lands not suited for timber production, considering physical, economic, and other pertinent factors, be identified and removed from the timber land base for at least ten years (16 U.S.C. § 1604(k).)

**XII. NINTH CLAIM FOR RELIEF:  
VIOLATION OF THE FEDERAL WATER  
POLLUTION CONTROL ACT AND  
THE PORTER-COLOGNE WATER QUALITY CONTROL ACT**

102. Plaintiffs incorporate by reference the allegations set forth in paragraphs one through 101 above.

103. The Federal Water Pollution Control Act, as amended, (FWPCA) 33 U.S.C. §§ 1251 *et seq.*, requires that each State develop and implement, subject to approval by the Administrator of the Environmental Protection Agency, water quality standards that protect and enhance the quality of the waters within the State. (FWPCA § 303, 33 U.S.C. § 1313.)

104. The California Porter-Cologne Water Quality Control Act (Ca. WQCA), Cal. Wat. C. § 1300 *et seq.*, requires that Water Quality Control Boards within the State establish water quality objectives that will ensure protection of the beneficial uses of the waters of the State. (Cal. Wat. C. §§ 13170, 13240-45.)

105. The water quality standards and water quality objectives that meet the requirements of the above-cited statutes and that apply to Blue Creek are set forth as "Water Quality Objectives" in the Water Quality Control Plan for the Klamath River Basin 1-A (1975, as amended). The Plan has been approved by the State Water Resources Control Board and the U.S. Environmental Protection Agency.

106. Federal defendants must comply with the aforesaid "Water Quality Objectives." (FWPCA § 313, 33 U.S.C. § 1323; Executive Order 12088—Federal Compliance with Pollution Control Standards (1978), 43 Fed. Reg. 47707).

107. The activities proposed in Blue Creek by defendants will violate several of the aforesaid Water Quality Objectives, including at least those for Nondegradation, Sediment, and Turbidity, in violation of both the FWPCA and the Ca. WQCA.

**XIII. TENTH CLAIM FOR RELIEF:  
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

108. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 101 above.

109. Due to the defendants' knowing and conscious failure to comply with their trust responsibilities, and to comply with the various statutes set forth above, plaintiffs have suffered a legal wrong because of agency action and are adversely affected and aggrieved by agency action within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 702.

110. Defendants' knowing and conscious failure to comply with their trust obligations and with the various statutes set forth above, is arbitrary, capricious, and an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, and without observance of procedure required by law within the meaning of the APA, 5

U.S.C. § 706(2), and should therefore be declared unlawful and set aside by this court.

### XIII. REQUEST FOR RELIEF

WHEREFORE, plaintiffs pray:

1. With regard to the First Amendment of the United States Constitution and the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

a) For a judgment declaring that roading and logging in the Blue Creek roadless area as proposed by the Blue Creek Unit Plan and construction of the Chimney Rock section of the G-O Road (activities collectively referred to hereafter as "Forest Service development plans for Blue Creek") would violate the First Amendment rights of the Yurok, Karok, and Tolowa Indian people, including the Indian plaintiffs and the American Indian Religious Freedom Act, and

b) For an order and judgment enjoining defendants preliminarily and permanently from constructing the Chimney Rock section of the G-O Road and from conducting any roading and logging activities in the Blue Creek roadless area that would be inconsistent with Indian religious practices and uses of the area.

2. With regard to the Indian reserved fishing and water rights:

a) For a judgment declaring that the Forest Service development plans for Blue Creek would interfere with fishing and water rights reserved to the Indians of the Hoopa Valley Indian Reservation, and

b) For an order and judgment enjoining defendants preliminarily and permanently from undertaking any activities in the Blue Creek roadless area that would interfere with such reserved fishing and water rights.

3. With regard to federal trust obligations:

a) For a judgment declaring that Forest Service development plans for Blue Creek would violate the trust

obligation of the United States to protect Indian religious freedom, Indian fishing rights, and Indian water rights, and

b) For an order and judgment enjoining defendants preliminarily and permanently from undertaking any activities in the Blue Creek roadless area that would violate such trust obligations.

4. With regard to the National Historic Preservation Act, 16 U.S.C. §§ 470-470n:

a) For a judgment declaring that defendants were required to initiate consultation with the State Historic Preservation officer and the Advisory Council on Historic Preservation on the effects of the Blue Creek Unit Plan on the Helkau Historic District before adopting the plan in 1981, and

b) For an order and judgment enjoining defendants preliminarily and permanently from commencing implementation of the Blue Creek Unit Plan until such time as it has completed the required consultation process.

5. With regard to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*:

a) For a judgment declaring that defendants have violated NEPA in connection with deciding upon Forest Service development plans for Blue Creek, and

b) For an order and judgment enjoining defendants preliminarily and permanently from implementing such Forest Service development plans for Blue Creek until such time as the agency has prepared and circulated for public comment an adequate Supplement to the existing EIS's or a new EIS on the 1981 plan; and has studied, developed, and described appropriate alternatives to that Plan.

6. With regard to the Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-531:

a) For a judgment declaring that defendants have violated the Act's requirements both in the process of



deciding upon a management plan and in deciding to adopt the Forest Service development plans for Blue Creek, and

b) For an order and judgment enjoining defendants preliminarily and permanently from constructing the Chimney Rock section of the G-O Road, from clearcutting and road building in the Blue Creek roadless area, and from otherwise taking actions in Blue Creek contrary to the requirements of Multiple Use, Sustained Yield Act.

7. With respect to the Forest and Rangelands Renewable Resources Planning Act, as amended by the National Forest Management Act, 16 U.S.C. § 1600-1604:

a) For a judgment declaring that Forest Service development plans for Blue Creek would violate the management standards and guidelines for national forest management set forth in 16 U.S.C. § 1604 and that the Blue Creek Unit Plan is not an "existing plan" that may be implemented pursuant to 16 U.S.C. § 1604(c), and

b) For an order and judgment enjoining defendants preliminarily and permanently from implementing the Blue Creek Unit Plan as to the Blue Creek roadless area.

8. With respect to the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*, and the California Porter-Cologne Water Quality Control Act, Ca. Wat. C. § 13000 *et seq.*:

a) For a judgment declaring that Forest Service development plans for Blue Creek would violate applicable water quality standards and water quality objectives; and

b) For an order and judgment enjoining defendants preliminarily and permanently from undertaking activities in Blue Creek that would violate federal or state water quality requirements.

9. For costs of suit herein, including reasonable attorneys fees.

10. For such other and further relief as the Court may deem just and proper.

DATED: July 30, 1982

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-82-5943 MHP

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE  
 NATIVE AMERICAN HERITAGE COMMISSION AND THE  
 RESOURCES AGENCY, PLAINTIFF,

v.

JOHN R. BLOCK, IN HIS OFFICIAL CAPACITY AS SECRETARY  
 OF THE UNITED STATES DEPARTMENT OF AGRICULTURE;  
 R. MAX PETERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF  
 THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT  
 OF AGRICULTURE: ZANE G. SMITH, JR., IN HIS OFFICIAL  
 CAPACITY AS REGIONAL FORESTER OF THE CALIFORNIA  
 REGION OF THE FOREST SERVICE OF THE UNITED STATES  
 DEPARTMENT OF AGRICULTURE, DEFENDANTS.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE  
 RELIEF AND MANDAMUS

Plaintiff, State of California, alleges:

I. INTRODUCTION

1. This action challenges two related Forest Service decisions to a) manage an administratively designated "Blue Creek Unit" of the Six Rivers National Forest in northwestern California by extensive clear-cutting involving construction of 200 miles of logging road, and b) to construct a high-standard road between the 30,000 acres of the Blue Creek Roadless area (hereinafter "Blue Creek") and the larger contiguous roadless area totaling more than 180,000 acres, which road will pass through the center of the sacred "high country" shared by the Native American religions of the Karok, Tolowa, and Yurok peoples.

### JURISDICTION

2. The jurisdiction of the Court is invoked pursuant to:

(a) the provisions of 28 U.S.C. § 1331(a) and 28 U.S.C. § 1221, this being an action for declaratory and injunctive relief arising under the Constitution and laws of the United States.

(b) 28 U.S.C. § 1361, this being an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff.

(c) Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which provides for judicial review of actions of federal agencies.

### PARTIES

#### A. Plaintiffs

3. Plaintiffs in this action all the State of California acting by and through its agencies, the Native American Heritage Commission and the Resources Agency.

(a) The Native American Heritage Commission is charged to protect the right to practice Native American religion on public land, including assurance of appropriate access and prevention of severe and irreparable harm to sacred sites. The Commission has been requested by Native American believers of the tradition surrounding the Blue Creek high country to take action to prevent its severe and irreparable harm by the Forest Service decisions here challenged.

(b) The Resources Agency and its subordinate departments are charged with the protection of fish and wildlife, water quality, forestry resources, and other natural resources of the State. The people of the State of California fish the salmon and other anadromous fish spawned in Blue Creek and the waters to which it is

tributary, and use the Blue Creek area for various pursuits, including fishing, camping, hiking, scientific and educational study, and aesthetic enjoyment.

#### B. Defendant

4. John R. Block is the Secretary of Agriculture of the United States. He is charged with the authority and responsibility to administer the National Forest and he has discretionary authority to review the final administrative decisions of the Chief Forester.

5. R. Max Peterson is the Chief of the Forest Service of the Department of Agriculture. He has the authority and responsibility to formulate, direct and supervise the execution of Forest Service policies, programs and activities, and to hear and decide on administrative appeals from the decision of a Regional Forester.

6. Zane G. Smith, Jr. is the Regional Forester of the California Region of the Forest Service of the Department of Agriculture. He has the authority and responsibility to formulate, direct and supervise the execution of all Forest Service policies, programs, and activities in the California Region.

### FACTS

7. Blue Creek is located about twenty miles inland from the Pacific Ocean in an area of steep (60 to 70%), rugged terrain with oversteepened, unstable side slopes bordering the stream courses, which include the East Fork, Crescent City Fork, and West Fork of Blue Creek, as well as Slide Creek and Nickowitz Creek. The altitudes range downward from over 6700 feet at Chimney Rock, which is a focal point of the Native American religious tradition and which forms part of the ridge used as the demarcation between the Blue Creek Unit and the adjacent larger roadless area and along or near which the high-

grade road is planned. South of this ridge are Doctor Rock, Bad Place, and Peak Eight, which are other points of concentration of the "high-country", the area of highest spiritual power in the religious tradition of the Karok, Yorok, and Tolowa peoples, the center of the earth.

8. The purity and integrity of the high country are the sine qua non of the ability to draw power for the well-being of the questor and the community. The individual going to the high country must complete ten days of fasting and praying in order to achieve sufficient purity and power to enter that powerful country, and privacy is essential in the high country in order to maintain that purity. Nothing may be removed except in accordance with specified religious procedures. Any changes to the area would destroy the cleanliness and power now attached, and would deprive the peoples of their ability to receive spiritual power and practice their religion.

9. Blue Creek's most prominent landform is landslide features, including hummocky landslide surfaces, steep crown scarps, and surface depressions, sometimes containing small ponds. The land is very unstable, and landslide activity is increased by seasonal heavy rainfall (110 inches), weak rock along numerous fault zones and steep slopes. Flow conditions are flashy; earthen material and debris are quickly flushed from the drainage system in the upper reaches and then deposited in the channel further down. All of the major soil types have a high probability of severe moisture stress for regeneration of vegetation on the predominant southerly and westerly slopes.

10. The area supports a complex mosaic of plant communities high in diversity and rich in endemics (plants whose range is limited to the Siskiyou or Klamath Mountains) and also rich in relics of older plant types. A number of species are rare and endangered. The prevailing climax is mixed evergreen forest, a transition between the northern conifers and the broad-leaf forests, including an out-

standing example of oak-madrone forest along the "golden stairs", a traditional Native American trail in the high country. The forest is broken by annual grasslands from one to ten acres on shallow soils on south and southwesterly exposures, and small wet meadows occurring in association with springs and ponds.

11. The streams in the Blue Creek Unit provide about 5% of all the anadromous fish production in the Klamath River, including King Salmon, Silver Salmon, and Steelhead Trout. They also have an important population of resident fish, primarily trout. Its diverse wildlife population contains five species requiring special protection; the spotted owl, pileated woodpecker, marten, fisher, and wolverine. Game species include the black bear, grouse, and quail.

12. In 1975 the Forest Service published a "Final Environmental Statement" (FES) for the Blue Creek Unit and the Eightmile Unit, another administratively designated unit adjacent to the north. In the FES was presented for the first time an alternative of leaving the Eightmile Unit in status quo pending evaluation of its wilderness potential as part of the larger roadless area and developing the Blue Creek Unit separately.

13. The Blue Creek Unit was identified as separate because of the existence of a primitive road not suitable for highway-type vehicles along the ridge which is used to demarcate it from the Eightmile Unit. This primitive road is connected on either side to paved road which has been built in segments over the years from the community of Gasquet to the North and the community of Orleans to the South and hence is called the Gasquet-Orleans or G-O Road. The FES considered whether the 7 to 10 mile "Chimney Rock Section" of the G-O should be completed.

14. On October 19, 1976, the Forest Supervisor of the Six Rivers National Forest approved a management plan for timber harvesting for all of the Blue Creek Unit and



those portions of the Eightmile Unit not a part of the roadless area. The Forest Supervisor planned for the harvest of 116 million board feet of timber each decade for eight decades, at the end of which time all the old-growth timber would be removed. The predominant mode of harvest would be clearcutting. Approximately 200 miles of logging roads would be constructed, 150 in the first decade. The decision whether to complete the G-O Road was put in abeyance in order to gain further information about the Native American use of the area.

15. This plan will cause severe disruption of the pristine naturalness and purity which are essential to the ability to draw spiritual strength and renewal from the high country, thus blocking the flow of that spiritual power and depriving the Karok, the Yurok, and the Tolowa believers of their right to practice their traditional religion.

16. The extensive clearcutting and roadbuilding on the steep, unstable soils will, especially in the concentrated periods of heavy runoff, cause landslides, severe erosion, and scouring and sedimentation of the creeks and the Klamath River which will destroy much of the anadromous and resident fish habitat in the Blue Creek streams and significant damage in the Klamath River. Clearcutting will jeopardize chances of regeneration of any vegetation on much of the soil. The destruction of the mixed, old-growth forest will cause some species to disappear. The scenic diversity and opportunity to enjoy hiking, fishing, hunting, and studying a diversity of habitats and species in a remote, primitive setting will be destroyed.

17. The decision of the Forest Supervisor to adopt the Blue Creek Unit Plan as above described was timely appealed by parties concerned with Native American religious interests and parties concerned with environmental values in accordance with Forest Service regulations (36 CF.R. § 211.19) to defendant Zane Smith, The Regional

Forester for the Region comprised of the State of California. In the appeal, the State of California submitted an amicus curiae brief on the position that to separate the Blue Creek roadless area from the larger contiguous roadless area for purposes of wilderness suitability evaluation under the Wilderness Act of 1964 (16 U.S.C. § 1131 *et seq*) was improper under Forest Service rules.

18. On or about February 19, 1981, the Regional Forester made a long-delayed decision to affirm the Forest Supervisor's plan, denying the appeal. This decision of the Regional Forester was timely appealed to defendant Peterson, Chief of the Forest Service, in accordance with Forest Service regulations. The Native American Heritage Commission and the Secretary of Resources submitted their views in the appeal.

19. On or about May 21, 1981, during the pendency of the appeal to the Chief Forester, several thousand acres of land of the Blue Creek high country were registered as the "Helkau [high country] District" on the National Register of Historic Places by the Secretary of the Interior for the protection of its cultural, religious values in accordance with the National Historic Preservation Act, 16 U.S.C. § 470a.

20. On or about July 29, 1981, the Regional Forester submitted a reply to the appeal of his decision to affirm the Blue Creek Unit plan wherein he directed the Forest Supervisor to prepare an "implementation plan" reflecting "updated statistical information developed during recent studies." The "implementation plan" submitted by the Forest Supervisor (dated June, 1981) was in fact an amended plan, differing from the unit plan adopted in 1976 in providing a fringe of trees around the focal points of the Native American religious use of the high country and providing for less intensive timber harvesting in certain other areas with a resultant one-fifth reduction in total timber output. No supplemental environmental analysis accompanied the revised plan.

21. On or about November 17, 1981, defendant Peterson, the Chief Forester, denied the appeal and directed the Forest Supervisor to formalize the *de facto* amended decision represented by the "implementation plan" in a new Record of Decision. On or about January 8, 1982, the Forest Supervisor issued this new Record of Decision. No supplemental environmental analysis accompanied the revised decision. Since Defendant Block did not exercise his discretion to review Chief Peterson's decision, it became final agency action.

22. On or about January 29, 1982 the Advisory Council on Historic Preservation notified defendant Block, Secretary of Agriculture, that the construction of the Chimney Rock section of the G-O Road would have "devastating effects on a historic property of great cultural value to the native peoples of the area", and recommended that it not be constructed, that neighboring sections of the road be closed to all but administrative traffic, that Native American religious access be protected, and that the Forest Service explore alternative routes for a road from the coast to the interior.

23. On or about March 2, 1982 defendant Smith, the Regional Forester, adopted a decision to build the Chimney Rock section of the G-O Road as a high-standard road on a route somewhat below the ridgetop marking the northern edge of the Blue Creek Unit which route penetrates right through the heart of the Native American sacred high country. The Decision was accompanied by a Final Environmental Statement (the Draft had been issued in November, 1977) which contained significant new information regarding the road's severe impact on Native American religious practices.

24. The planned Chimney Rock section of the G-O Road, creating a serious unnatural intrusion into the center of the high country and carrying logging trucks, many vehicle-centered recreational users, and their attend-

ant visual, noise and other pollution will severely and irreparably injure the natural integrity and purity of the high country which are the essential qualities to permit the Yurok, Karok, and Tolowa peoples to draw spiritual strength and power from the area, an injury going to the very core of the religion.

25. The planned Chimney Rock section of the G-O Road will cut the Blue Creek roadless area off from the larger contiguous roadless area before the entire area can be properly evaluated for its wilderness potential. The road will cause landslides and extensive erosion damaging to the quality of the streams and their ability to support fish, and the increased human presence will jeopardize the continued presence of sensitive species. Finally, the road depends for its justification upon, and will lead to, intense logging of the Blue Creek roadless area.

26. The Regional Forester's decision was timely appealed in accordance with Forest Service regulations (36 C.F.R. § 211.19) to defendant Peterson, the Chief Forester. The Native American Heritage Commission and the Secretary of the Resources Agency for the State of California presented their concerns in the appeal process. On or about July 26 1982, the Chief Forester denied the appeal, and since defendant Block, Secretary of Agriculture, did not exercise his discretion to review the decision it became final agency action.

27. Plaintiff is informed and believes that on or about November 1, 1982, the Forest Service plans to open bids already submitted by construction companies for the contract to construct the Chimney Rock section of the G-O Road and to award the contract soon thereafter. Plaintiff is informed and believes that road construction is planned to commence soon after the award of the contract.

28. Plaintiff will suffer immediate and irreparable injury from the threatened and imminent actions of defendants in constructing the G-O Road through Blue



Creek and roading and logging Blue Creek. Plaintiff has no adequate remedy at law.

### **CLAIMS FOR RELIEF**

#### **A. Violation of First Amendment Guarantee of Freedom to Exercise Religion**

29. The allegations contained in paragraphs 1 through 28 of this complaint are herein incorporated by reference.

30. The First Amendment to the Constitution of the United States forbids the federal government from interfering with the free exercise of religion.

31. The planned despoilation of the purity and naturalness of the Blue Creek high country, the area of highest spiritual power, the center of the world for the traditional religion and thereby abridge their right to the free exercise of that religion.

#### **B. Violation of the American Indian Religious Freedom Act**

32. The allegations contained in paragraphs 1 through 31 of this complaint are herein incorporated by reference.

33. The American Religious Freedom Act of 1978, 42 U.S.C. § 1996 declares the policy to protect for Native Americans their right of freedom to exercise their traditional religions, "including but not limited to access to sites. . ." As the American Religious Freedom Act Task Force recognized in its Report to Congress, "[p]hysical access to the land and its natural products must also include the preservation of the natural conditions which are the sine qua non of that access." Task Force Report at 54.

34. The severe disruptions to the natural conditions in the Blue Creek sacred high country which will be brought about by the construction of the G-O Road and the roading and logging of the land constitutes denial of access to the most sacred of the Native American religion of the Yurok, Karok, and Tolowa peoples in violation of the American Religious Freedom Act.

#### **C. Violation of National Historic Preservation Act**

35. The allegations contained in paragraphs 1 through 34 of this complaint are herein incorporated by reference.

36. The National Historic Preservation Act of 1966 as amended (16 U.S.C. §§ 470-470n) requires the head of each agency to take into account the effect on any undertaking on any site which is included in or eligible for inclusion in the National Register and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on any undertaking which shall have an effect.

37. The Blue Creek high country of the Yurok, Karok, and Tolowa religious tradition is eligible and has been included in the National Register as the Helkau District.

38. The Forest Service violated the National Historic Preservation Act in failing to follow the required procedures thereunder in the Blue Creek Unit Plan for logging and roading the Helkau District, which will have a severe negative impact on it.

#### **D. Violation of Forest Service Regulations Implementing the Wilderness Act of 1964**

39. The allegations contained in paragraphs 1 through 38 of this complaint are herein incorporated by reference. The Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.* provides for management to preserve the natural condition of selected "area[s] of undeveloped Federal land retaining [their] primeval character and influence, without *permanent* improvements. . ." (16 U.S.C. § 1131(c); emphasis added) Forest Service Manual § 2321.11d(2) provides that lower standard roads, such as the primitive road which now traverses the ridge at the boundary of Blue Creek, can be closed and will recover naturally, and therefore are not permanent improvements removing an area from candidacy for Wilderness Act protection.



40. Section 8262 of the Forest Service Manual requires that in evaluating roadless areas for suitability for protection under the Wilderness Act the entire contiguous roadless area is to be considered as a whole without regard to the boundaries of individual planning units or inventoried roadless units.

41. It was in violation of Forest Service regulations to decide to construct the Chimney Rock section of the G-O Road and to log and road Blue Creek without its prior evaluation for Wilderness Act protection as a part of the larger contiguous 180,000 acres of roadless area.

#### E. Violation of the National Environmental Policy Act

42. The allegations contained in paragraphs 1 through 41 of this complaint are herein incorporated by reference.

43. The National Environmental Policy Act (NEPA) 42 U.S.C. 4321 *et seq.* was enacted with the purpose of promoting efforts to prevent or eliminate damage to the environment. The action-forcing provisions under NEPA require the following:

a. Agencies must accompany every proposal for a major Federal action significantly affecting the quality of the human environment with a detailed statement, called an Environmental Impact Statement (EIS), which discloses the need for and nature of the project, its environmental impact (including the cumulative impact), mitigation measures, and alternatives to the proposed project in a manner sufficient to permit a finely tuned and systematic balancing analysis of environmental versus other values.

b. The EIS must first be prepared in a Draft and circulated for comments by interested agencies and the general public. The Final EIS must then be prepared by including the comments received and the agency's response to those comments.

c. Where the agency makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relating to those concerns, the agency must prepare a supplemental EIS, circulate it for comment, and respond to those comments.

d. The Record of Decision must (a) include a discussion of the relevant factors which were balanced by the agency in making its decision and (b) state whether all practicable means to avoid or minimize environmental harm from the alternative selected were incorporated into the decision, and if not, why not.

In the decision to adopt the Blue Creek Unit Plan NEPA was violated, including, but not limited to, in the following ways:

a. The EIS did not adequately describe the cultural-religious value of Blue Creek in the Yurok, Karok and Tolowa religious traditions or the impact of the plan by itself and in conjunction with the G-O Road on these cultural-religious values.

b. The EIS did not adequately describe the admittedly adverse impact of the water quality degradation from landslides and erosion on fisheries, including the cumulative impact with the G-O Road and the natural background sedimentation.

c. The EIS fails adequately to address the habitat need of the sensitive species identified and how the project would affect them.

d. The EIS did not adequately describe the wilderness characteristics of Blue Creek in terms of its scenic and unusual qualities or in relation to the larger contiguous roadless area.

e. The EIS did not discuss the obvious alternatives of supplying lumber from already developed areas or of harvesting by less damaging methods, such as not using clear-cutting and harvesting by helicopter to obviate the need for extensive roading.

f. The EIS did not adequately discuss mitigation measures for regeneration failure, landslides, erosion, preservation of sensitive species habitat, water quality and fisheries.

g. The EIS contained unjustified biases, particularly in triple-counting the value of timber, failure to include the economic value of wilderness while calculating the greatest economic value for timber harvest still within the realm of reason, and relying on an economic emergency which was long-since past.

h. The Forest Service failed to prepare and circulate a supplemental EIS which was required before the 1976 decision on the basis of changed economic conditions, and which was required prior to the 1981 amended decision because of much significant new additional information, in particular with regard to the Native American religious use and impact, and because of the changed nature of the project which significantly altered the economic-environmental balance.

i. The Record of Decision for the amended 1981 decision failed to discuss relevant factors which were balanced by the Forest Service in making its decision or to state whether all practicable means to avoid or minimize the environmental harm from the alternative selected had been incorporated, and if not, why not.

44. The decision to construct the Chimney Rock section of the G-O Road violated NEPA requirements, including, but not limited to, the following ways:

a. The EIS did not adequately describe the impact of water quality degradation on fisheries, including the cumulative impact with the Blue Creek Unit Plan and the natural background sedimentation.

b. The EIS did not adequately describe the wilderness characteristics of Blue Creek in terms of its scenic and unusual qualities or in relation to the larger contiguous roadless area.

c. The EIS did not adequately discuss the secondary impacts of the road resulting from increasing human use, particularly the impact on the sensitive wolverine.

d. The EIS failed to consider the obvious alternatives of the Bald Hills route for connecting the coast to the interior which would not pass through Blue Creek, or of having a lower grade road open only to administrative traffic and closing the adjacent Dillion-Flint road to all but administrative traffic.

e. The EIS contained unjustified biases, particularly in overvaluing timber harvesting, fuel savings and jobs, and failing to assign economic value to wilderness.

f. The EIS inadequately summarized comments and responses thereto, particularly in regard to impacts on Native American religious values.

g. The Record of Decision failed to discuss relevant factors which were balanced by the Forest Service in making its decision or to state whether all practicable means to avoid or minimize the environmental harm from the alternative selected had been incorporated, and if not, why not.

#### F. Violation of the National Forest Management Act

45. The allegations contained in paragraphs 1 through 44 of this complaint are herein incorporated by reference.

46. The National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*, amended the Forest and Rangelands Renewable Resources Planning Act to include, in part, new or more sensitive criteria for the management of the National Forest System, including the following:

a. management to provide for diversity of plant and animal communities.

b. insuring that timber will be harvested only where  
i) soil, slope, and other watershed conditions will not be irreversibly damaged



ii) there is assurance that such lands can be adequately stocked within 5 years

iii) protection is provided for streams from deposits of sediment where harvests are likely to seriously and adversely affect fish habitat.

iv) the harvesting systems is not selected primarily because it will give the greatest dollar return or the greatest timber output.

c. Clearcutting will be used only where it is the optimum method, it is consistent with the multiple use of the entire area, patches are blended in with the terrain, maximum patch size is determined according to local conditions, and the cuts are consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resources.

d. Lands not suited for timber production, considering physical, economic, and other relevant factors, will be identified and no timber harvest shall occur on such lands for at least 10 years.

47. The Blue Creek Unit Plan which the Forest Service plans to implement violates the above-described provisions of the National Forest Management Act.

#### **G. Violation of the Multiple-Use, Sustained-Yield Act**

48. The allegations contained in paragraphs 1 through 47 of this complaint are herein incorporated by reference.

49. The Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531 directs the Secretary of Agriculture to administer the National Forest for harmonious and coordinated use of various resources without impairment of productivity and with considerations to "relative values" rather than merely "the combination of uses that will give the greatest dollar return or the greatest unit output."

50. The adopted Blue Creek Unit Plan for intensive timber harvesting on unstable, non-regenerative soils in an area with very high wilderness-related values will result in

damage to soil, water, fisheries, wildlife and wilderness-related resources in violation of this act.

#### **H. Violation of Federal Water Pollution Control Act**

51. The allegations contained in paragraphs 1 through 50 of this complaint are herein incorporated by reference.

52. Under the Federal Water Pollution Control Act (33 U.S.C. *et seq.*) federal agencies are subject to and must comply with water quality standards (33 U.S.C. § 1323 E.O. 12088 43 Fed. Reg. 47707) which must be adopted by each state and approved by the Administrator of the Environmental Protection Agency (13 U.S.C. § 1313).

53. Under the authority of the California Porter-Cologne Water Quality Control Act (California Water Code § 1300 *et seq.*, §§ 13170, 13240-50) water quality standards for Blue Creek have been adopted in the Water Quality Control Plan for the Klamath River Basin I-A (1975, as amended) and approved by the Administrator of the Environmental Protection Agency.

54. In violation of the Federal Water Pollution Control Act the implementation of the Blue Creek Unit and the construction of the Chimney Rock section of the G-O Road will violate those adopted standards, particularly those relating to sediment, turbidity, and nondegradation.

#### **I. Violation of Administrative Procedure Act**

55. The allegations contained in paragraphs 1 through 54 of this complaint are herein incorporated by reference.

56. All of the foregoing violations of law set forth in this complaint constitute agency action which is arbitrary, capricious, in abuse of discretion, and not in accordance with law; is contrary to constitutional right or in excess of statutory jurisdiction; without observance of procedure required by law; and/or unwarranted by the facts within the meaning of the Administrative Procedure Act (5 U.S.C. § 706), and causing a legal wrong to plaintiff (5 U.S.C. § 702).



**RELIEF**

WHEREFORE, plaintiff prays for the following relief:

1. A judgment declaring that the logging and roading of the Blue Creek high country as planned by the Blue Creek Unit Plan and that the planned construction of the Chimney Rock section of the G-O Road would violate the rights guaranteed to its Native American religious users by the First Amendment of the United States Constitution and the American Indian Religious Freedom Act; and a judgment and order enjoining defendants preliminarily and permanently from conducting or permitting logging or roading in Blue Creek which would interfere with traditional Yurok, Karok, and Tolowa religious practices there.

2. A judgment declaring that the decision to adopt the Blue Creek Unit Plan was made without complying with Forest Service regulations regarding evaluation of the Blue Creek roadless area for protection under the Wilderness Act as part of the larger contiguous roadless area; and a judgment and order enjoining defendants from taking or permitting any action affecting its wilderness qualities until the wilderness evaluation has been properly made in the context of the larger contiguous roadless area.

3. A judgment that defendants violated the National Historic Preservation Act in failing to seek and consider the comments of the Advisory Council on Historic Preservation concerning the effect of the Blue Creek Unit Plan on the Helkau District; and a judgment and order enjoining defendants preliminarily and permanently from taking or permitting any action in reliance thereon until they have solicited and considered such comments.

4. A judgment declaring that the decisions to adopt the Blue Creek Unit Plan and to construct the Chimney Rock section of the G-O Road were made without compliance with the procedures required by the National En-

vironmental Policy Act; and a judgment and order enjoining defendants preliminarily and permanently from taking or permitting any action in reliance thereon until it has prepared and circulated adequate EISs and prepared Records of Decision which adequately reflect the weighing process and the extent and adequacy of mitigation measures.

5. A judgment declaring that the Blue Creek Unit Plan and the decision to construct the Chimney Rock section of the G-O Road violate the purposes and standards imposed on the management of the National Forest by both the National Forest Management Act and the Multiple-Use Sustained-Yield Act; and a judgment enjoining defendants preliminarily and permanently from carrying out or permitting any roading or logging activity until a plan has been adopted which conforms to the substantive and procedural requirements of those acts.

6. A judgment declaring that the Blue Creek Unit Plan and the decision to build the Chimney Rock section of the G-O Road would be in violation of water quality standards with which defendants are required to comply under the Federal Water Pollution Control Act; and a judgment enjoining defendants preliminarily and permanently from carrying out or permitting activities in Blue Creek which would violate such standards.

7. For costs of suit herein, and for such other and further relief as the court deems proper and just.

DATED:

GEORGE DEUKMEJIAN,  
Attorney General of the State  
of California  
ROBERT H. CONNETT  
Assistant Attorney General  
EDNA WALZ  
Deputy Attorney General

By /s/ EDNA WALZ

Edna Walz  
Attorneys for the State of  
California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO. C-82-4049 SAW

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, ET AL., PLAINTIFFS,

v.

R. MAX PETERSON, ET AL., DEFENDANTS.

ANSWER

Defendants R. MAX PETERSON, JOHN R. BLOCK, UNITED STATES FOREST SERVICE and UNITED STATES OF AMERICA, hereinafter called defendants, hereby set forth their answer to the complaint in the subject case. The paragraphs of the answers correspond to the paragraphs of the complaint.

1. Answering the first sentence of paragraph 1, defendants deny that Blue Creek is either "remote" or "wild" or the inference that "clearcutting" is the only silvicultural system that will be used in that area. Each and every allegation of sentence 2 is denied. Defendants lack the information to admit or deny the allegations of sentences 3 and 4. Each allegation contained in sentences 5, 6, 7, 8 and 9 are denied.

2. Paragraph 2 contains conclusions of law for which no answer is required.

3. Paragraph 3 contains conclusions of law for which no answer is required.

4. Paragraph 4 contains conclusions of law for which no answer is required.

5. Based upon a lack of information to admit or deny the allegations of sentences 1, 2, 3 and 4 of paragraph 5,

the defendants deny all allegations in sentences 1, 2, 3 and 4. The allegations contained in sentence 5 are denied. Defendants lack the information to admit or deny each of the allegations of sentence 6, and therefore deny the allegations of sentence 6. Defendants deny each allegation contained in sentences 7 and 8 of said paragraph.

6. Defendants lack the information to admit or deny the allegations contained in sentences 1, 2, 3, 4, 5, 6, and 7 of paragraph 6 of the complaint, and therefore deny all allegations in sentences 1, 2, 3, 4, 5, 6 and 7 of paragraph 6 of the complaint. Defendants deny the allegations of sentence 8 of said paragraph.

7. Defendants admit Sam Jones is a registered Yurok Indian but lack the information to admit or deny the remaining allegations of sentences 1, 2, 3, 4 and 5 of paragraph 7 of the complaint, and therefore deny all allegations of said paragraph 7.

8. Defendants lack the information to admit or deny the allegations of sentences 1 (but admit that plaintiff is 1/2 Yurok Indian), 2, 3, 4, 5 and 6 of paragraph 8. The allegations of sentence 7 are denied.

9. Defendants admit that Christopher H. Peters is 9/16 Yurok and 2/16 Karok and lack the information or belief to admit or deny the remaining allegations of sentences 1, 2, 3, 4 and 5 of paragraph 9. The allegations of sentence 6 are denied.

10. Defendants lack the information to admit or deny the allegations of paragraph 10, and therefore deny the allegations in paragraph 10.

11. Defendants deny the allegation of sentence 1 of paragraph 8 that Blue Creek has a "wild character" or "wilderness qualities." While the defendants admit that the Sierra Club has been active in participating in Forest Service planning process affecting Blue Creek and pursuing administrative appeals of the decisions that are the subject of this case, the defendants lack the information to admit

or deny any of the other allegations contained in paragraph 11, and therefore deny all remaining allegations.

12. Defendants lack the information to admit or deny the allegations of paragraph 12, and therefore deny all said allegations.

13. Defendants lack the information to admit or deny the allegations of sentences 1 and 2 of paragraph 13 of the complaint, and therefore deny the allegations of sentences 1 and 2. Defendants admit the allegation of sentence 3 that a bill dealing with Blue Creek has passed the House of Representatives. However, this bill provides for a corridor between the Blue Creek and Eight-Mile Roadless areas for completion of the Gasquet-Orleans (G-O) Road. Defendants admit the allegations of sentence 4. Defendants lack the information to admit or deny the allegations of sentence 5 and 6, and deny said allegations except that defendants specifically deny that the Blue Creek area is "spectacular" as alleged in sentence 6.

14. Based upon a lack of information and belief, the defendants deny the allegations of paragraph 14.

15. Defendants lack the information to admit or deny the allegations of sentence 1 of paragraph 15 of the complaint, and therefore deny said allegations. Defendants deny that Blue Creek is "one of the richest and most productive tributaries of the Klamath River" as alleged in sentence 2. Defendants admit that Blue Creek does contain some summer steelhead as alleged in sentence 2. Defendants lack the information to admit or deny the remaining allegations of sentence 2. Defendants admit the allegations of sentence 3. Defendants lack the information to admit or deny the allegations of sentence 4, and therefore deny said allegations.

16. Based upon a lack of information and belief, the defendants deny the allegations of paragraph 16.

17. Defendants lack the information to admit or deny the allegations of paragraph 17 of the complaint, and



therefore deny all allegations except that defendants admit that plaintiff Siskiyou Mountains Resource Council has pursued administrative appeals of Forest Service decisions in this case.

18. Based upon defendants' lack the information to admit or deny the allegations of paragraph 18 of the complaint, defendants deny all allegations of paragraph 18.

19. Defendants lack the information to admit or deny the allegations contained in paragraph 19 of the complaint, and therefore deny all said allegations except that defendants admit that plaintiff Audubon Society has pursued administrative appeals of the issues in this lawsuit.

20. Defendants lack the information to admit or deny the allegations of paragraph 20, and therefore deny all such allegations in paragraph 20.

21. Defendants lack the information to admit or deny the allegations of sentence 1, 2, 3, 4, 5 and 7 of paragraph 21 of the complaint, and therefore deny all said allegations except that defendants specifically deny the allegations of sentence 3 that Blue Creek is "sacred", contains "rare" plants or is an "important fishery". Defendants admit the allegations of sentence 6. Defendants lack the information to admit or deny the allegations of sentence 7, and therefore deny the allegations in sentence 7.

22. Defendants lack the information to admit or deny the allegations of sentences 1, 2, 3 and 4 of paragraph 22 of the complaint, and therefore deny all said allegations. Defendants admit sentence 5.

23. Defendants lack the information to admit or deny the allegations of paragraph 23 of the complaint, and therefore deny all said allegations except that defendants admit Mr. Admodio has pursued administrative appeals on these matters.

24. Defendants deny each and every allegation contained in paragraph 24 of the complaint.

25. Defendants admit the allegation of paragraph 25.

26. Defendants admit the allegations of paragraph 26 except that sentence 4 of said paragraph should read defendant "Block" rather than defendant "Peterson".

27. Defendants admit the allegation of paragraph 27.

28. Defendants admit the allegations of paragraph 28.

29. Defendants admit the allegations of sentences 1, 3 and 4 of paragraph 29. Defendants admit the allegation of sentence 2 that the forest encompasses approximately 965,000 acres. However, defendants deny that the forest is located within the aboriginal territories of Indian tribes. Portions of Indian aboriginal territories are located within the boundaries of the Six Rivers National Forest. Defendants deny the allegation of sentence 5 that the Blue Creek area is roadless, undeveloped and 31,000 acres.

30. Defendants deny that Blue Creek is "precipitous" as alleged in sentence 1 of paragraph 30. Blue Creek merely has steep slopes as does the majority of the mountainous area of the Six Rivers National Forest. Defendants deny that Bear Pen Flat is part of Blue Creek or is virgin forest as alleged in sentence 3. Bear Pen Flat is privately owned and has been extensively logged. In addition, defendants deny that the waters of Blue Creek "plummet" as alleged in sentence 3. The waters merely flow and in some places cascade. Defendants deny the allegations of sentence 4. The most prominent landform in Blue Creek is timber covered mountain ridges and valleys, not landslides. Answering sentence 5, defendants admit that Blue Creek streams account for nearly 5% of the anadromous fish production of the Klamath River. However, defendants deny that Blue Creek is an excellent spawning and rearing habitat. It is far below optimum. Defendants admit the allegations in sentence 6 that summer steelhead is listed by the Forest Service as "sensitive" but deny that it is classified as a "rare" species.

31. Defendants deny that Blue Creek provides a diversity of wildlife habitat as alleged in sentence 1 of

paragraph 31 of the complaint. The allegation of sentence 2 is denied. The allegations of sentence 3 are admitted. Answering sentence 4, Blue Creek does not contain any known federally listed "rare" threatened or endangered species, however, there are plants listed by the Forest Service as "sensitive". Defendants deny each and every allegation contained in sentences 4, 5 and 6 of said paragraph.

32. Defendants deny each and every allegation of paragraph 32.

33. Defendants deny each and every allegation of paragraph 33.

34. Defendants deny each and every allegation of paragraph 34 on the basis of a lack of information or belief.

35. Defendants deny the allegations of sentence 1 of paragraph 35 of the complaint. Defendants lack the information to admit or deny the allegations of sentence 2, and therefore the allegations are denied. The allegations of sentence 3 are denied.

36. Defendants admit the allegations of sentence 1 of paragraph 36 of the complaint insofar as they pertain to the Hoopa Indian Reservation. Defendants deny each of the remaining allegations of said paragraph. The only hunting, fishing, and water rights reserved to the Indians were those within the boundaries of the Hoopa Valley Indian Reservation. Outside the reservation, the Hoopa Indians only have the same rights as any other citizen of the United States.

37. Defendants admit the allegations of paragraph 37 of the complaint. However, the portion of the Multiple Use Plan quoted from by plaintiffs applies only to the creek named Blue Creek and not the entire management area known as Blue Creek.

38. Defendants admit the allegations of paragraph 38.

39. Defendants admit the allegations of sentences 1 and 2 of paragraph 39. However, defendants allege that

the boundary between the Eight-Mile and Blue Creek Units was drawn along the path followed by the existing Chimney Rock section of the G-O Road. This existing road is also one of the remarkable and prominent landforms along the ridge. The allegations of sentence 3 are denied.

40. Defendants deny the allegations of paragraph 40 of the complaint. The Eight-Mile and Blue Creek planning units are divided by the Chimney Rock section of the G-O Road. The 55-mile road from Gasquet to Orleans was started in the 1930s and has been since the 1960s, used and is presently being used by the public and by logging trucks. The reconstruction of the Chimney Rock section of 6.2 miles would merely complete the upgrading of the G-O Road. The design speed for the entire road is 25 mph, except for the existing Chimney Rock section.

41. The allegations of paragraph 41 are denied. The G-O Road was constructed in the 1930s. Reconstruction on various segments began in the 1960s. While each road segment does have independent utility, the benefits derived will be greatly enhanced from a reconstructed through road for the last connecting 6.2 miles.

42. Each of the allegations of paragraph 42 are denied. The G-O Road of 55 miles is already joined. The reconstruction of the Chimney Rock section of 6.2 miles would merely complete the process of upgrading the last portion of the road. The present road without any reconstruction is now open to two-wheel drive sedans as well as commercial logging trucks. It is a smooth paved, well graded road for 49 miles and 6 miles of gravel base road that is drivable.

43. Each of the allegations of sentences 1, 2 and 3 of paragraph 43 of the complaint are denied. The document filed on May 20, 1975 was a Final EIS which did meet the requirements of the National Environmental Policy Act (NEPA). The alternatives analyzed in that document



varied from maximum preservation to maximum economic development. Defendants admit the allegations in sentence 4. Defendants deny the portion of sentence 5 that state that the preferred alternatives committed all of the Eight-Mile and Blue Creek roadless areas to intensive roading and logging. Several areas were classified as non-operable or allocated as resource zones to be primarily managed for other purposes such as wildlife, scenery, recreation and cultural values.

44. Defendants admit the allegations of sentences 1, 2, 3 and 6 of paragraph 44. The allegation in sentence 4 is denied and the answer to sentence 5 of paragraph 43 is incorporated herein by reference. Defendants admit the allegations of sentence 5 except that defendants deny that the timber will be harvested "primarily through clearcutting".

45. Each and every allegation of paragraph 45 of the complaint is denied.

46. Defendants deny each and every allegation of sentences 1 and 2 of paragraph 46. The allegations of sentence 3 are denied. While the words quoted from the study are correct, they are taken out of context and give a different meaning to the conclusion reached by the report.

47. Defendants admit paragraph 47.

48. Defendants admit sentence 1 of paragraph 48. The allegation of sentence 2 is denied. Defendants admit the allegation of sentence 3 that the Regional Forester decided the appeal on February 19, 1981, however, each of the remaining allegations of said sentence are denied.

49. Defendants admit paragraph 49.

50. Each of the allegations of paragraph 50 are denied. The Secretary of the Interior on May 21, 1981 determined only that the "Helkau District" was "eligible" for inclusion in the National Register. He did not list it. This determination was based on past use of the area, not continuing use.

51. Defendants admit the allegations of paragraph 51 except that the date of the Regional Forester's direction to the Forest Supervisor was February 19, 1981.

52. Defendants deny the allegations of sentence 1 of paragraph 52. Answering sentence 2, defendants deny that the plan "called for intensive roading and logging over the entire unit" or for cutting "primarily through clearcutting" or that "considerable" acreage was moved from one zone to another. Defendants admit that the plan adopted does call for some clearcutting, does reduce the projected timber output by 21% and does move some acreage from one zone to another. Defendants admit the plan identified six new "Native American Contemporary Use Areas" within the Blue Creek Unit but lack the information to admit or deny, and therefore deny what or where is the "sacred high country". Defendants deny the allegations of sentence 4. The changes in the plans were based on studies and data accumulated prior to the 1975 Unit plan FES as well as the data gathered after the date of the FES. Answering sentence 5, defendants admit that the document did not include an updated environmental analysis or an updated benefits and costs analysis. However, defendants deny that there was no mention of the Helkau District. The district was specifically mentioned in the document.

53. Defendants admit sentence 1 of paragraph 53. Answering sentence 2, defendants admit that the Forest Supervisor was directed to issue a new decision, however, defendants deny that the direction given required the Forest Supervisor to adopt the 1981 Implementation Plan. Defendants admit the allegation of sentence 3 that the Forest Supervisor issued a new Record of Decision on January 8, 1982, however, the remaining allegations of said sentence are denied.

54. Defendants admit the allegations of paragraph 54 that the Forest Supervisor's action constituted the final



agency action on the Blue Creek Unit Plan. All remaining allegations or inferences of said paragraph are denied.

55. Defendants deny the allegations of sentences 1 and 2 of paragraph 55 on the basis that references to the words "construction" and "construct" should read "reconstruction" and "reconstruct" and the words 600 to 1300 ft should be inserted for the word "slightly". The allegations of sentence 3 are denied.

56. Each and every allegation of paragraph 56 is denied.

57. The allegations of paragraph 57 are denied. The existing road already severs the Blue Creek roadless area from the roadless lands to the north.

58. Defendants deny the allegations of paragraph 58 on the basis that the word "contract" should read "reconstruct".

59. Defendants deny the allegations of paragraph 59. The word construction should read "reconstruction". In addition, the deadline for submission of bids has been extended to November 1, 1982.

60. Defendants deny each and every allegation of paragraph 60. The answers to paragraphs 45, 46, 56 and 57 are incorporated by reference.

61. The allegations of paragraph 61 are denied.

62. The answers to paragraphs 1 through 61 are incorporated by reference in answer to paragraph 62 of the complaint.

63. Paragraph 63 is a conclusion of law which need not be answered.

64. Defendants admit that the Regional Forester acknowledges that certain local Indians consider the area important to some Indian beliefs, and deny as to all remaining defendants.

65. Defendants lack the information to admit or deny the allegations of paragraph 65, and therefore the allegations are denied.

66. Defendants deny each and every allegation of paragraph 66.

67. Defendants deny each and every allegation of paragraph 67.

68. Defendants incorporate by reference their answers to paragraphs 1 through 67 in answer to paragraph 68 of the complaint.

69. Answering paragraph 69, the American Indian Religious Freedom Act must be read as a whole. Plaintiffs' quote is correct but taken out of context. The allegations are therefore conclusions of law which need not be answered.

70. Sentence 1 of paragraph 70 is a conclusion of law and need not be answered. The allegations of sentence 2 are denied.

71. Each and every allegation of paragraph 71 is denied.

72. Defendants incorporate by reference their answers to paragraph 1 through 71 in answer to paragraph 72 of the complaint.

73. Defendants admit the allegations of paragraph 73.

74. Answering the allegations of paragraph 74, no part of the property involved for the reconstruction of the Chimney Rock section of the G-O Road lies within the boundaries of the Hoopa Valley Indian Reservation. The allegations of said paragraph are therefore denied.

75. Defendants lack the information to admit or deny the allegations of paragraph 75, and therefore the allegations are denied.

76. Answering paragraph 76, no part of the property involved for the reconstruction of the Chimney Rock section of the G-O Road lies within the boundaries of the Hoopa Valley Indian Reservation.

77. Paragraph 77 states conclusions of law which need not be answered. To the extent the paragraph alleges facts, they are denied.

78. Defendants deny the allegation that there will be degradation to the fish spawning habitat of any stream running through the Reservation as stated in paragraph 78. The remainder of said paragraph states a conclusion of law which need not be answered.

79. Defendants deny each and every allegation of paragraph 79.

80. Defendants incorporate by reference their answers to the allegations of paragraphs 1 through 79 in response to paragraph 80.

81. Defendants lack the information to admit or deny the allegations of paragraph 81, and therefore the allegations are denied.

82. Paragraph 82 states conclusions of law which need not be answered. No part of the G-O Road is within the Hoopa Indian Reservation. To the extent facts are alleged, they are denied.

83. Defendants incorporate by reference their answers to paragraphs 1 through 82 in answer to paragraph 83 of the complaint.

84. In answer to paragraph 84, the National Historic Preservation Act speaks for itself.

85. In answer to paragraph 85, the Executive Order and regulations cited therein speak for themselves.

86. Paragraph 86 is a conclusion of law which need not be answered.

87. Defendants deny the allegations of sentence 1 of paragraph 87 of the complaint. Sentence 2 states a conclusion of law which need not be answered.

88. The allegations of paragraph 88 are denied.

89. Defendants incorporate by reference their answer to the allegations of paragraph 1 through 88 in answer to paragraph 89.

90. Answering paragraph 90, the National Environmental Policy Act and regulations promulgated

thereunder speak for themselves. Plaintiffs' allegations are conclusions of law which need not be answered.

91. Answering paragraph 91, the CEQ regulations speak for themselves. Plaintiffs' allegations are conclusions of law which need not be answered, and defendants deny that a supplement to the EIS is required.

92. Defendants incorporate by reference their answer to paragraph 90 in answer to the allegations of paragraph 92.

93. Paragraph 93 contains conclusions of law which need not be answered. To the extent there are allegations of fact, they are denied.

a. Defendants admit that a supplement was not prepared to the 1975 FES but deny that a supplement was necessary as alleged in subparagraph (a). Defendants deny that the adoption of the implementation plan in 1981 constituted a substantial change or that significant new circumstances and information had developed. All other allegations are denied.

b. Defendants deny the allegations of subparagraph (b). The FES did accurately and adequately disclose all significant impacts associated with the proposal to reconstruct the Chimney Rock section of the G-O Road.

c. The allegations of subparagraph (c) are denied. The two EIS's fully considered the impacts of the proposed projects on the wilderness values of the Blue Creek Roadless Area as well as on the adjacent roadless areas.

d. The allegations of subparagraph (d) are denied.

e. Defendants deny each of the allegations of subparagraph (e).

f. Each of the allegations of subparagraph (f) is denied.

g. The allegations of subparagraph (g) are denied. Defendants presented and evaluated the reasonable alternatives for the management of Blue Creek.

h. Defendants deny each allegation of subparagraph (h). The reasonable and appropriate alternatives were examined prior to adopting the implementation plan for Blue Creek.

94. Defendants incorporate by reference their answers to the allegations of paragraphs 1 through 93 in answer to paragraph 94.

95. Answering paragraph 95, the Multiple-Use Sustained Yield Act speaks for itself. Plaintiffs' allegations state conclusions of law which need not be answered.

96. The allegations of paragraph 96 are denied.

97. The allegations of paragraph 97 state conclusions of law which need not be answered. To the extent that any facts are stated therein, they are denied.

98. Defendants incorporate by reference their answer to the allegations of paragraphs 1 through 97 in answer to paragraph 98.

99. Paragraph 99 states conclusions of law which need not be answered. The Forest and Rangelands Renewable Resources Planning Act as amended by the National Forest Management Act speak for themselves.

100. Paragraph 100 states conclusions of law which need not be answered. To the extent that the paragraph contains any allegations of facts, they are denied.

101. Paragraph 101 states conclusion of law which need not be answered. To the extent that the paragraph contains any allegations of facts, they are denied.

102. Defendants incorporate by reference their answers to paragraphs 1 through 101 in answer to paragraph 102.

103. Paragraph 103 contains only conclusions of law which need not be answered.

104. Paragraph 104 contains only conclusions of law which need not be answered.

105. Defendants deny the allegation of sentence 1 of paragraph 105. Sentence 2 is admitted.

106. Paragraph 106 states a conclusion of law which need not be answered.

107. Paragraph 107 contains conclusion of law which need not be answered. To the extent that the paragraph contains allegations of fact, they are denied.

108. Defendants incorporate by reference their answers to the allegations of paragraphs 1 through 101 in answer to paragraph 108.

109. Paragraph 109 states conclusions of law which need not be answered. To the extent the paragraph contains any factual allegations, they are denied.

110. Paragraph 110 states conclusions of law which need not be answered. To the extent the paragraph contains any factual allegations, they are denied.

#### AFFIRMATIVE DEFENSES

1. All plaintiffs in this action which were plaintiffs in case entitled,

*EDWIN GAIL DONAHUE, a minor by Leland J. Donahue his next friend; JIMMIE P. JAMES; CALVIN RUBE; CHARLIE THOM; SISKIYOU MOUNTAINS RESOURCES COUNCIL; SIERRA CLUB; CALIFORNIA NATIVE PLANT SOCIETY; TIMOTHY McKAY; JOHN J. AMODIO, Plaintiffs,*

v.

*EARL L. BUTZ, Secretary of Agriculture, individually and in his official capacity; JOHN R. McGUIRE, Chief of the United States Forest Service, individually and in his official capacity; DOUGLAS R. LEISZ, Regional Forester, Region V, individually and in his official capacity; RICHARD BURKE, Forest Supervisor, Six Rivers National Forest, individually and in his official capacity; and their respective successors in office; FOLEY ROADS CO.; and V & K. LOGGING CO., INC., a joint venture, Defendants,*



Civil No. C-76-0922 LHB, are barred by the doctrine of *res judicata* from relitigating in this action the same issues which were plead, tried and decided in the Findings of Fact and the Conclusions of Law and Order, entered by this court on June 11, 1976, which Order of Dismissal by the Honorable Lloyd H. Burke was appealed by plaintiffs to the Court of Appeals for the Ninth Circuit and dismissed.

2. All plaintiffs in this action which were not plaintiffs in the case referred to in Affirmative Defense No. 1 above, who were aware of said case, are collaterally estopped from relitigating the same issues which are *res judicata* as to the same plaintiffs in both actions.

3. The plaintiffs fail to state a claim upon which relief can be granted.

WHEREFORE, defendants request that:

1. Plaintiffs take nothing by their complaint;
2. Said complaint be dismissed with prejudice; and
3. For such other and further relief as the court may deem just and proper.

DATED: September 28, 1982.

JOSEPH P. RUSSONIELLO  
United States Attorney

By: /s/ RODNEY H. HAMBLIN  
Rodney H. Hamblin  
Assistant United States  
Attorney  
Chief, Land and Natural  
Resources Division  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-82-4049 SAW

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, ET AL., PLAINTIFFS,

v.

R. MAX PETERSON, ET AL., DEFENDANTS.

CIVIL No. C-82-5943 SAW

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE  
NATIVE AMERICAN HERITAGE COMMISSION AND  
THE RESOURCES AGENCY, PLAINTIFF,

v.

JOHN R. BLOCK, ET AL., DEFENDANTS.

[FILED DEC. 27, 1982]

ANSWER TO COMPLAINT OF  
STATE OF CALIFORNIA, ET AL.

Defendants JOHN R. BLOCK, MAX PETERSON and ZANE G. SMITH, JR., hereafter called defendants, hereby set forth their answer to the complaint in the subject case. The paragraphs of the answer correspond to the paragraphs of the complaint.

1. Each and every allegation of paragraph 1 of the complaint is denied.

2. Paragraph 2 contains conclusions of law for which no answer is required.

3a. Defendants deny the allegations of paragraph 3a of the Complaint in that the term "public lands" does not apply to the land owned by the United States of America. In addition, plaintiff Native American Heritage Com-

mission lacks standing to bring this matter to court in that the Commission did not comply with the procedure of Section 5097.97 of the California Public Resources Code prior to requesting the California Attorney General to bring this action in its behalf.

3b. Defendants admit sentence 1 of paragraph 3b. In answering sentence 2 of said subparagraph, defendants admit that the people of the State of California use the Blue Creek area for various activities but without more detailed information as to specifically where these activities take place, defendants lack the information or belief to admit or deny said sentence. The allegations of said sentence are therefore denied.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. Answering sentence 1 of said paragraph, defendants deny that Blue Creek is "twenty miles" from the Pacific Ocean or that the terrain has "oversteepened" side slopes. In addition, defendants deny that the West Fork of Blue Creek is a part of the Blue Creek Management Unit. Answering sentence 2 of said paragraph, defendants admit that the altitude ranges downward from over 6,700 feet at Chimney Rock. Each and every remaining allegation of sentence 2 is denied. Answering sentence 3, defendants deny that the area has spiritual power for all of the Karok, Yurok and Tolowa peoples. It only has religious significance for some of the Karok, Yurok and Tolowa peoples.

8. Defendants admit the allegations of sentence 1 of paragraph 8 of the complaint. Defendants deny each and every allegation of sentences 2 and 3 of said paragraph.

9. Defendants deny the allegations of sentence 1 of paragraph 9 of the complaint. The most prominent landform in Blue Creek is timber covered mountain ridges and

valleys, not landslides. Defendants deny the remaining allegations of sentences 2, 3 and 4 of said paragraph.

10. Defendants admit the allegations of sentences 1, & 3 of paragraph 10 of the complaint. The allegations of sentences 2 and 4 are denied.

11. Defendants admit the allegations of sentences 1, 2 and 4 of paragraph 11 of the complaint. Defendants deny the allegations of sentence 3 of said paragraph. Blue Creek does not contain any known federally listed threatened or endangered species.

12. Defendants admit the allegation of sentence 1 of paragraph 12 of the complaint. The allegations of sentence 2 are denied.

13. Defendants deny the allegation of paragraph 13 that the unpaved portion of the G-O road is "primitive." Although the road along the ridge is unpaved it is smooth, very well graded and has established culverts. With that exception the remaining allegations are admitted.

14. Defendants deny that the Blue Creek Management Plan provides for timber harvesting for "all" of Blue Creek. Although the management plan does call for some clearcutting it also sets aside special areas for the protection of Indian cultural resources and wildlife. The remaining allegations of said paragraph are admitted, except the logging roads will not be built at one time.

15. Defendants deny each and every allegation of paragraph 15.

16. Defendants admit the allegations of sentence 1 of paragraph 17 that the Forest Supervisor's decision was timely appealed by parties concerned with native American religious interests and environmental interests. Defendants deny that the characterization of the decision is accurate "as above described" and incorporate by reference their previous answer to the prior description. Defendants admit the allegations of sentence 2 of said paragraph.

18. Answering sentence 1 of paragraph 18 of the complaint, defendants deny that the Regional Forester's decision was "long-delayed." Answering sentence 2 and 3, defendants admit that the decision was timely appealed by various parties but deny that it was timely appealed by the State of California.

The State of California submitted an appeal well past the time deadline for an appeal. The State of California was informed by the Forest Service that they therefore could not be treated as an appellant of that decision.

19. Defendants admit the allegations of paragraph 19.

20. Defendants admit the allegations of sentences 1 and 3 of paragraph 20 of the complaint. Answering sentence 2 of said paragraph, defendants deny that the implementation plan submitted by the Forest Supervisor was an "amended" plan.

21. Defendants deny the allegations of paragraph 21 that the Chief directed the Forest Service to formalize a "de facto amended" decision represented by the implementation plan. The remaining allegations of said paragraph are admitted.

22. Defendants admit the allegations of paragraph 22.

23. Answering sentence 1 of paragraph 23, defendants deny that the route of the Chimney Rock section of the G-O road "penetrates right through the heart of the Native American sacred high country." The remaining allegations of said sentence are admitted. Defendants deny the allegation of sentence 2 that the Final Environmental Statement contained "significant new information, or that the road will have severe impact on Native American religious practices."

24. Defendants deny each and every allegation of paragraph 24.

25. Defendants deny each and every allegation of paragraph 25. Defendants allege that the roadless areas referred to by plaintiffs are already separated by the G-O road.

26. Answering sentences 1 and 2 of paragraph 26, defendants admit that the Regional Forester's decision was timely appealed by other parties but not by the State of California. The State's appeal was filed well past the time deadline. Defendants admit the allegation of sentence 3 of said paragraph.

27. Defendants admit the allegation of sentence 1 of paragraph 27. The allegations of sentence 2 are admitted.

28. The allegations of paragraph 28 are denied.

29. Answering paragraph 29, defendants incorporate herein their answers to paragraph 1 through paragraph 28.

30. Paragraph 30 states a conclusion of law which need not be answered.

31. Defendants deny each and every allegation of paragraph 31 of the complaint.

32. Answering paragraph 32, defendants incorporate by reference herein their answers to paragraphs 1 through 31.

33. Paragraph 33 states conclusions of law which need not be answered. To the extent that any factual allegations are made they are denied. The quote from the American Religious Freedom Act Task Force is taken out of context and does not represent the true intent of the Report.

34. Defendants deny each and every allegation of paragraph 34 of the complaint.

35. Answering paragraph 35, defendants incorporate by reference herein their answers to paragraphs 1 through 34.

36. Paragraph 36 states a conclusion of law which need not be answered.

37. Defendants deny the allegations of paragraph 37. A portion of the Blue Creek Unit of approximately 13,000 acres was included in the National Register as the Helkau District based on past historical Indian use.

38. Defendants deny each and every allegation of paragraph 38 of the complaint.



39. Answering the first sentence of paragraph 39, defendants incorporate by reference herein their answers to paragraphs 1 through 38. Sentence 2 states a conclusion of law which need not be answered. Each and every allegation of sentence 3 commencing on line 13 is denied.

40. Answering paragraph 40, the provision of the Forest Service Manual Section 8262 speaks for itself and no answer is required.

41. Defendants deny each and every allegation of paragraph 41 of the complaint.

42. Answering paragraph 42, defendants incorporate by reference their answers to paragraph 1 through paragraph 41.

43. Paragraph 43 of the complaint states conclusions of law which need not be answered. To the extent that subsections a. through i. plead any factual allegation they are denied.

44. Paragraph 44 of the complaint states conclusions of law which need not be answered. To the extent that subsections a. through g. plead any factual allegation they are denied.

45. Answering paragraph 45, defendants incorporate by reference their answers to paragraphs 1 through 44.

46. Paragraph 46 of the complaint states conclusions of law which need not be answered.

47. Paragraph 47 states a conclusion of law which does not need to be answered. To the extent that any factual allegations are made they are denied.

48. Answering paragraph 48, defendants incorporated by reference their answers to paragraphs 1 through 47.

49. Paragraph 49 of the complaint states conclusions of law which need not be answered.

50. Paragraph 50 states a conclusion of law which needs no answer. To the extent any factual allegations are made they are denied.

51. Answering paragraph 51, defendants incorporate by reference herein their answers to paragraphs 1 through 51.

52. Paragraph 52 of the complaint states conclusions of law which need not be answered.

53. Defendants admit the allegations of paragraph 53.

54. Paragraph 54 states conclusions of law which need not be answered. To the extent any factual allegations are made they are denied.

55. Answering paragraph 55 defendants incorporate by reference herein their answers to paragraph 1 through paragraph 54.

56. Paragraph 56 states conclusions of law which need not be answered. To the extent any factual allegations are made they are denied.

#### AFFIRMATIVE DEFENSES

1. Plaintiffs are collaterally estopped from relitigating the same issues decided by this court in the case of *Edwin Gail Donohue, et al. v. Earl L. Butz*, Civil No. C-76-0922 LHB.

2. Plaintiffs are barred from raising issues in this case which should have been raised but which they failed to raise in the case of *State of California v. Block*, 690 F2d 753 (9th Cir. 1982).

3. Plaintiff Native American Heritage Commission lacks standing to bring this action under the provisions of California Public Resources Code Section 5097.97.

4. Plaintiff State of California is barred from bringing this action because it failed to timely pursue its administrative remedies.

5. Plaintiffs fail to state a claim upon which relief can be granted.

WHEREFORE, defendants request that:

1. Plaintiffs take nothing by their complaint;
2. Said complaint be dismissed with prejudice; and

3. For such other and further relief as the court may deem just and proper.

DATED: December 27, 1982

JOSEPH P. RUSSONIELLO  
United States Attorney

By: /s/ RODNEY H. HAMBLIN  
Rodney H. Hamblin  
Assistant United States  
Attorney  
Chief, Land and Natural  
Resources Division  
Attorneys for Defendants

UNITED STATES DEPARTMENT OF  
AGRICULTURE  
FOREST SERVICE  
P.O. Box 2417  
Washington, D.C. 20013

JUL 26, 1982

CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED

Ms. Julie E. McDonald, et al.  
Sierra Club Legal Defense Fund  
2044 Filmore Street  
San Francisco, California 94115

Dear Ms. McDonald:

This is my letter of decision on the administrative appeal of the Regional Forester's decision of March 2, 1982, to reconstruct the Chimney Rock Section of the Gasquet-Orleans (G-O) Road on the Six Rivers National Forest in Northwest California. This decision was based on alternative D4 of the Gasquet-Orleans Road (Chimney Rock Section) Final Environment Impact Statement. This letter of decision responds to the notice of appeal and the statement of reasons for all appellants listed below:

Julie E. McDonald  
Sierra Club Legal Defense Fund  
2044 Filmore Street  
San Francisco, CA 94115  
Sylvia Glum  
P.O. Box 1466  
Crescent City, CA 95531

Marilyn Miles  
 California Indian Legal Services  
 P.O. Box 1228  
 917 Third Street  
 Eureka, CA 95501

The Committee of Concern for the  
 Traditional Indian  
 P.O. Box 5167  
 San Francisco, CA 94101

Native American Heritage Foundation  
 State of California, Department of Justice  
 Plaza Tower Bldg.  
 559 Capital Mall, Suite 350  
 Sacramento, CA 95814

Mr. David Dillman  
 P.O. Box 403  
 Occidental, CA 95465

Charles P. Selden  
 Redwood Region Audubon Society  
 P.O. Box 1054  
 Eureka, CA 95501

Ken Barr  
 1003 B Street  
 Eureka, CA 95501

Robert L. Kinney, Jr.  
 177 Wilson #68  
 Albany, CA 94706

Huey D. Johnson, Secretary for Resources, State of California, filed an untimely appeal; however, as a courtesy to the State, this letter addresses the State of California's concerns in the text of the reply.

The issues and problems addressed by the appellants are many and complex. They cited numerous alleged defi-

ciencies in the decision of the Regional Forester. The statements of reasons reflect a strong concern for the environment and the Native American culture and religion. We genuinely appreciate the efforts made by the appellants. We note the willingness to commit time and effort to competently express views on this important matter.

The major concerns expressed in the appeals centered upon the alleged impacts of Alternative D4 of the Gasquet-Orleans Road (Chimney Rock Section) Final Environmental Statement. For sake of brevity, we are consolidating the concerns in a single, nonrepetitive list that encompasses the significant concerns of all appellants. The substantive concerns in the statements of reasons are as follows:

#### 1. *Native American Concerns*

The appellants allege the location of the proposed road construction encompasses sacred Native American "high country" which is considered by appellant native Americans as an area of highest sacred power and a place where Indian doctors draw power for healing. The appellants claim that the Forest Service breached its statutory duty under the American Indian Religious Freedom Act and violated the Indians' constitutional rights under the First Amendment's Free Exercise of Religious Cause. The appellants consider the Forest Service decision arbitrary and capricious regarding treatment of Indian concerns. They contend that the environmental impact statement erred in protecting cultural sites rather than preserving their sacred values, and that the environmental impact statement should recognize the high country as a whole rather than merely protect isolated cultural sites. They assert that qualitative, psychological, and sensory aspects of the Indians' use of the area need to be considered in addition to the purely physical.



## 2. *Economic Concerns*

The appellants alleged that the employment situation in Del Norte County does not justify building the road for economic purposes. The appellants state the cost/benefit figures are biased and weak and allege the economic analysis is flawed to flavor the preferred location. They state that the depressed economy in the area does not justify a decision to complete the Gasquet-Orleans Road. The appellants state that the 28,000 gallons of fuel saved by improved access is unimportant compared to the Indians' religious values foregone.

## 3. *Environmental Concerns*

The appellants allege sedimentation caused by road reconstruction poses a threat to fisheries and reservation fishing rights. They state that the Forest Service has failed to address, directly or indirectly, the serious impacts caused by the road and allege the FEIS understates the adverse wildlife and watershed impacts caused by the project. They claim the visual standards were established prior to recognition of the significant cultural values in the area. The appellants allege that the Wilderness values are inadequately evaluated.

## 4. *Analysis and Evaluation*

The appellants claim error by the Forest Service in evaluating public comments. They suggest that separate EIS's and decisions for the Blue Creek Unit and the Gasquet-Orleans Road imply that the areas are independent and allege the FEIS has failed to properly evaluate reasonable alternatives. They allege that the decision was biased and commodity-interest oriented. The appellants claim that cumulative environmental effects and wilderness values were not considered.

## 5. *National Historic Preservation Act*

The appellants allege that the Forest Service breached the spirit and letter of Section 106 of the National Historic Preservation Act of 1966. They state that the Forest Service failed to satisfy the statutory mandate of the Act and did not consider the opinion of the Advisory Council on Historic Preservation.

### *Discussion*

The Regional Forester's response was complete, sufficiently detailed, and factual. The reasoning in the Regional Forester's response is adopted as part of this decision. Except for the following clarification, we see no need to comment further on the Regional Forester's response of June 10, 1982. A review of the Final Environmental Impact Statement indicates there was no indication of faulty procedure or bias in the evaluation of data or the determination of alternatives as alleged by the appellants.

The response statement of the Regional Forester provides an accurate and sensitive response to claims that the Native American's religious freedom will be jeopardized by this project. Because most of the appeals focused on the Native American religious concerns, we feel it important to expand on that aspect in this decision letter.

We believe the decision of the Regional Forester to reconstruct the Chimney Rock Section of the Gasquet-Orleans (G-O) Road was developed with a sincere interest in protecting Native American Indian cultures consistent with other statutory responsibilities. Alternative D4 minimizes the physical and visual impact of the road reconstruction upon the religious sites. Nonetheless, appellants claim that the Indian uses of the "high country" must be essentially exclusionary to the road improvement and the other uses and people that will be brought to the area by the improved access.

National Forest System lands are managed by the Forest Service under statutory mandates requiring multiple use of the natural resources. Of course, every use cannot take place on every acre of land—in some places, a particular use may exclude some or all other uses. However, it is the responsibility of the Forest Service, through land management planning, to establish the mixture of uses that will best meet the needs of the American people. The land use planning and environmental analysis process aid in the determination of whether a particular road placement makes the most judicious use of the land.

The Final Environmental Impact Statement (FEIS) for the Eightmile-Blue Creek Unit Plan called for completion of the G-O Road reconstruction. The Forest Supervisor's decision letter of October 19, 1976, stated the road would not be reconstructed until a detailed project environmental analysis was completed. The change was based upon the desire to be sensitive to newly discovered Native American cultural sites.

Similarly, in the Final Environmental Impact Statement, Gasquet-Orleans Road (Chimney Rock Section), 1982, a route for the final section of the road was selected that would minimize adverse impacts of the road while retaining the benefits of the projects.

Appellants have not shown a compelling reason to forego the benefits that will accrue to the general public from completion of the road as planned. The appellants' arguments against the road project are not supported by their citation to the National Historic Preservation Act, the First Amendment, or the American Indian Religious Freedom Act.

The Helkau Historic District has been declared eligible for listing in the National Register and contains previously identified Native American cultural sites, such as trails and religious ritual locations. Section 106 of the National

Historic Preservation Act of 1966 requires consideration of values of these identified specific areas, but does not provide for exclusive use and protection of areas within the interior boundary of the Helkau Historic District that have not been identified. The Forest Service planning process activities met both the spirit and statutory requirements of Section 106 of the National Historic Preservation Act.

The First Amendment guarantees free exercise of religion; however, this right has always been balanced by the establishment clause. It would not be consistent with established constitutional principles for the government to provide land for one religious use that would exclude other activities in the area. The establishment clause of the United States Constitution prohibits the government from giving preferential treatment to any religion.

The American Indians Religious Freedom Joint Resolution established that it is a policy of the United States to protect and preserve the religious traditions of the American Indians. This resolution included specific references to "access to sites" and "freedom to worship through ceremonials and traditional rites." The decision to complete the G-O Road will not deny the American Indians either their right of access to their religious sites or their right to worship.

Similar questions about the National Historic Preservation Act, the First Amendment, and the American Indian Religious Freedom Joint Resolution have recently been resolved by a Federal court in the *Hopi Indian Tribe v. Block* (Civil Action No. 81-0481, D.D.C. 1982). In that case native American plaintiffs sought to block enlargement of a ski resort and force removal of the existing amendment in San Francisco Peaks area in Arizona. The Court, in its June 15, 1981, Memorandum Opinion, said that the actions by the Forest Service to allow the expan-

sion of a ski area on National Forest System land did not force the plaintiffs "to embrace any religious belief, or to say or believe anything in conflict with their religious tenets; nor have they forced plaintiffs to choose between their religious beliefs and some public benefit." The court ultimately held for the Forest Service on all issues.

The religious beliefs and practices of the Native American appellants have coexisted with the National Forest activities for a number of years. The decision to adopt Alternative D4 continues to allow Indians access to their religious sites and does not restrict their right to practice their religious beliefs. A specific, concerned effort was made to protect the Indian's religious sites in the decision under appeal. Future significant activities or projects that affect the "high country" will receive detailed analysis in accordance with the National Environmental Policy Act requirements.

#### Decision

Our review of the extensive written record of this appeal shows that the decision made by the Regional Forester complies with all statutes and regulations. The decisions made to protect the environment and the Native American culture are responsive to overall multiple use objectives. In view of the Regional Forester's responsive statement of June 10, 1982, and our review of the record, we affirm the Regional Forester's decision of March 2, 1982, to adopt Alternative D4 in the Gasquet-Orleans Road (Chimney Rock Section) Final Environmental Impact Statement.

We urge the appellants, with a special invitation to the Native Americans and their representatives, to work with local Forest Service officials to improve communications and coordinate the efforts to protect the vital interests of all parties.

A copy of this letter of decision is being delivered to the Office of the Secretary pursuant to the requirement of 36 CFR 211.19(i)(2). On his own initiative, the Secretary may decide within 10 days of receipt to review our decision. He will not consider any request for such review. In the event the Secretary does not review the decision within 10 days after receipt, this decision will constitute the final administrative determination of the Department of Agriculture.

Sincerely,

/s/ R. MAX PETERSON

R. Max Peterson  
Chief



## RECORD OF DECISION

Gasquet-Orleans Road, Chimney Rock Section  
Del Norte and Humboldt Counties  
California

USDA-Forest Service  
Six Rivers National Forest

### THE DECISION

It is my decision to adopt Alternative D4, the Low-Slope Route, as described in the final environmental impact statement (FEIS), as the selected route for the reconstruction and relocation of the Chimney Rock Section of the Gasquet-Orleans Road (G-O Road). My decision is based on the environmental analysis of this section of the road plus the other considerations expressed in the discussion section of this Record of Decision. This section of road is 6.02 miles in length and will complete the entire 55 mile project as originally conceived and planned beginning in 1963. The road will be double-lane, asphalt surfaced, with a design speed of 25 miles per hour. Cost of construction is estimated at \$1.95 million.

### ALTERNATIVES CONSIDERED

The FEIS considered three new route locations (Alternatives B, C, and D), as well as continued use of the existing low-standard road (Alternative A—the No Action Alternative), within the Chimney Rock Section.

*The No-Action Alternative (Alternative A)* considered the effects of not reconstructing this section of road and continuing to use the present low-standard road to tie the double-land sections to the north and south together, a distance of about 8 miles. The effects of this alternative

include foregoing the benefits of flexible haul opportunities for forest products, the scenic drive for the public as well as through access for other recreation uses, fuel saving benefits, and administrative flexibility and economy.

Continued use of the present low-standard road traversing the ridgetop of the "high country" would perpetuate the existing effects on the ideological-spiritual values of the American Indian users.

*The Ridge Route (Alternative B)* considered three variations located along the main ridge system between the Blue Creek and Eight Mile Creek drainages. The route is 8.0 miles long, has the lowest initial construction cost and the highest maintenance cost. Slope and stability aspects are the most favorable. It is the least desirable from the viewpoint of cultural and American Indian spiritual values. It provides basic access needs for the area but is least desirable for purposes of providing future access options in adjacent land areas.

*The Mid-Slope Route (Alternative C)*—is 7.57 miles in length, and is located mid-slope in the Blue Creek drainage. It is the most expensive to construct and maintain. There would be no direct ground disturbing effects to archaeological properties. However, portions of this alternative would be highly visible to religious practitioners from some of the peaks. At its nearest point, this route would be situated approximately one-half (1/2) air mile from Chimney Rock, which would be within a zone of adverse audible effect caused by construction and use of the Road. The geologic setting is not sensitive. Slopes are steeper than Alternative B, but potential effects are not significant.

*The Low-Slope Route (Alternative D4)* has the benefit of being shorter, next to the lowest construction cost, and the

most favorable maintenance costs. The effect on archaeological sites would be indirect in nature. There would be no ground disturbing activities near archaeological properties. Being lower on the slope, there would be fewer adverse visual impacts. This alternative is the farthest removed from contemporary spiritual sites; thus, the adverse audible intrusions associated with the road would be less than all other alternatives. The geologic setting and effects are similar to Alternative C. The potential for adverse geologic effects are low in magnitude.

Forest Service standards and guidelines directing all management practices on National Forest lands apply to each of the above alternatives. These include use of Best Management Practices to assure maintenance of water quality in the Blue Creek watershed. During construction and annual use of the road, we will be in consultation with representatives of the California Department of Fish and Game and the U.S. Department of the Interior, to insure that fish and wildlife requirements are met and sensitive plant species are known, identified and protected. American Indian religious sites have been identified, and half-mile radius set-backs have been provided wherein timber harvesting and other management practices will be restricted or prohibited. There will be continued consultation with local American Indian representatives and the State Historic Preservation Officer to assure Indian interests are considered and National Historic Preservation Act procedures are followed.

There are no flood plains involved.

#### ALTERNATIVE CORRIDORS

Other transportation corridors have been considered to provide access to the remote portions of the Forest north of the Klamath River between Highways 96 and 101.

These include the *Highway 101 Outlet to Klamath Glen*, and the *Southern Loop*. These corridors have the disadvantage of: higher costs due to crossing steep, unstable terrain; extensive reconstruction outside of the National Forest Boundary; high maintenance costs; and high costs of right-of-way acquisition. These corridors also traverse areas that have American Indian ideological values. Timber haul costs would be higher. Therefore, since the mid-1960's, Forest Service efforts have focused on completing the North-South tie between Orleans and Gasquet.

#### DISCUSSION

The multiple-use benefits and opportunities provided by the G-O Road are very significant to the development of the timber and recreation resources and to the economies of Del Norte and Humboldt countries. Public interest was expressed by a favorable ballot in Del Norte County in June 1980 in support of the G-O Road. Plans for completion of the road have been known for over 20 years and construction of the first segments started in 1963.

During planning for this road and during studies relating to the Blue Creek Unit Plan since the early 1970's, the ideological-religious values of the "high country" placed by the American Indians have been established. Through consultation with local Indians and contracted studies, a number of religious sites have been identified in the "high country." The Forest Service considered the value of these sites and proposed a portion of this "high country" as a candidate area for recognition in the Register of Historic Places. This portion of the "high country", known as the Helkau District, was submitted to the Advisory Council on Historic Preservation as a candidate area in 1980. Procedures have been followed according to 36 CFR 800 since that time. The Forest Service recognizes that the G-O Road Alternatives traverse portions of the Helkau



District. Effects of the road on the District have been mitigated by road location and by the set-backs discussed earlier.

The Advisory Council on Historic Preservation, after reviewing the Preliminary Case Report, visiting the site, and conducting a public meeting, has recommended that the Chimney Rock Section not be constructed. They also recommended that the Dillon-Flint and Summit Valley Sections be closed to all but administrative traffic and that further studies be made to find an access route to the interior.

In preparing and presenting these recommendations the Advisory Council has been critical of Forest Service planning procedures for this project and has stated that segmented planning has permitted a large investment in the road thus precluding a reasonable decision to stop the project at this time. The Advisory Council feels that the G-O Road project would have devastating effects on historic properties and cultural values to the native people of the area. Our assessment is that the historic properties and cultural values will be affected, but the effects will not be devastating. Access to the historic sites and areas of religious practice is not being deprived. Some native people may feel access is enhanced. Individual sites are known and will not be disturbed. Mitigation measures will reduce audio and visual effects. Native people will not have exclusive use within the protective areas, but the natural environment will remain undisturbed. New roads and trails will not be permitted in these areas. A decision not to reconstruct the existing road, and to close the adjacent sections of constructed road, would deprive the general public of many benefits and unnecessarily limit their use of the area.

I have considered the recommendations made by the Advisory Council. As discussed in the preceding paragraphs,

alternative routes for a road from the coast to the interior have been previously studied and rejected. Additional studies in this regard are not appropriate and would only duplicate previous efforts. It is clear to me that alternative routes would be environmentally less desirable.

Land management standards can be met under all alternatives if mitigation measures are implemented. However, Alternative D4 represents the best balance of the several values considered and retains the basic integrity of the natural resource, cultural resources and American Indian spiritual values involved.

This decision is subject to administrative review in accordance with the provisions of 36 CFR 211.19.

This project will be implemented no sooner than thirty (30) days after this decision has been published in the Federal Register by the Environmental Protection Agency.

3/2/82

DATE

/s/ ZANE G. SMITH, JR.

ZANE G. SMITH, JR.  
Regional Forester  
Pacific Southwest Region



**RECORD OF DECISION**

**BLUE CREEK UNIT PLAN  
SIX RIVERS NATIONAL FOREST  
DECEMBER 1981**

As directed by the Chief, USDA-Forest Service, in his decision of November 17, 1981, the Forest Supervisor's decision of October 19, 1976, is hereby revised to incorporate new and incremental information obtained as a result of continuing study and experience in the management of the Six Rivers National Forest while an administrative review (appeal) of the original decision was being conducted.

Alternative E, with modifications, was originally selected for the management of the Blue Creek Unit by Forest Supervisor Burke. This Record of Decision reaffirms the decision of October 19, 1976, and adopts the Alternative E Implementation Plan which gives additional management direction for the resources in Blue Creek as follows:

**A. Establish Protective Zones around Cultural sites:**

1. Designate a one-half (1/2) mile radius protective zone around the following cultural sites: (1) Dr. Rock #1; (2) Peak 8; (3) Bad Place; (4) Chimney Rock; (5) South Red Mtn. #1; (6) South Red Mtn. #2; (7) Doctor Rock #2; (8) Meadow Seat; (9) Wylie's Classic Prayer Seat; (10) Turtle Rock.
2. Designate a one-quarter (1/4) mile wide protective zone along the Golden Stairs Trail as identified on the Alternative E Implementation Plan Map. A road crossing of the Golden Stairs Trail will be permitted.
3. Fire suppression activities will be modified by restricting the use of long-term dye-colored aerial fire

retardant, requiring fireline construction by hand tools unless tractor use is approved by the Forest Supervisor, and restricting the use of the helicopters in fire suppression to landing sites in natural openings.

4. Designate protective measures for significant Indian cultural and religious sites as may be identified in future project planning and management activities. As contemporary users come forth with additional information, evaluate such information and reevaluate the protective zones, adopt additional protective measures, or revise existing protective measures.

The purpose of this direction is to assure identification and protection of significant Indian cultural and religious sites in the Blue Creek Unit, reduce or eliminate direct disturbance to religious activities, and to minimize indirect disturbance to Indian religious activities. The above protective measures may limit or preclude: timber harvesting, road construction, recreation improvements, trail construction, off-road vehicle use, mineral extraction and construction of structures.

Implementation of this direction will result in decreasing the Intensive Forest Management Zone by about 4,000 acres and increasing the Native American Cultural Use Areas Zone by the same amount. The effects on soils, water quality, fisheries, air quality, botany, visual quality, wildlife, and socio-economic elements will generally be favorable. Withdrawal of the sites from mineral entry will have little or no effect on the availability of critical minerals. The Golden Stairs Trail will not be maintained and will eventually revert to a natural condition. Most of the area affected is low site (Site IV or V) and therefore potential timber yield is not significantly reduced.

**B. Refine Resource Capability and Management Zones as shown in the Implementation Plan.**

Zoning for intensive forest management, stream channel protection, and areas of low soil productivity are modified as shown in Appendix B of the Implementation Plan. As a result, about 4,890 acres will be removed from the Intensive Forest Management Zone. This will reduce the regulated timber harvest in Blue Creek from 929 MMBF to 733 MMBF (21%) over an 80-year period.

The areas of high potential for landslides and geological hazards have been avoided. Stream channels and water quality will be further protected as a result of the redesignation. Soil areas of low productivity have been rezoned to reflect soil limitations of the site. The fishery resource will be further protected as a result of rezoning areas into Stream Protection Zones. The effects on the resource elements of wildlife, air quality, visual quality, recreation and minerals will not significantly change over what was set forth in the original plan.

The need for the establishment of protective zones around Indian cultural and religious sites and the need to adjust the boundaries of the various resource zones became apparent as studies and environmental analysis developed for construction of the Gasquet-Orleans Road during the period 1977-1979, and in data collection and preliminary work for forest-wide land and resource planning (the Six Rivers Forest Plan). As a result, 8,890-acres of land previously zoned for Intensive Forest Management is rezoned to other categories as indicated above.

The following studies and regulations that were generated subsequent to the original decision were considered in reaching this Record of Decision:

- The Endangered Species Act of 1973, PL 96-159, amended 12/28/79

- The occurrence of Wolverine & Other Mammals by Baited Hair Traps, Snow Transects in Six Rivers National Forest, April 1979
- Best Management Practices, U.S. Forest Service—California Water Resource Control Board
- Soil Resource Inventory Order III, Region 5, 1975-80
- Fishery/Water Quality 1977
- Compartment Inventory Analysis, 1977-80
- California Wildlife Habitat Relationship 1979
- California Native Plant Society Rare & Endangered Species List
- Forestwide Land and Resource Management Planning Data 1979-80
- California Native Plant Society—Plants Presumed Extinct List
- U.S. Fish & Wildlife Service Candidate Species List
- Draft Environmental Impact Statement, Gasquet-Orleans Road, Chimney Rock Section 1977
- Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest, 1979 (Theodoratus Report)

Such studies and data collection will continue and information will be employed, as appropriate, in management direction for this area in the future.

/s/ JOSEPH H. HARN

January 8, 1982

Joseph H. Harn  
Forest Supervisor



**Appendix K to Defendant's Exhibit G (D. Theodoratus, et al.,  
"Cultural Resources of the Chimney Rock Section, Gasquet-Orleans  
Road, Six Rivers National Forest")**

**Religious Beliefs and Practices**

The most important aspect of the present study has been the examination of those beliefs and practices which must be subsumed, although inadequately, under the discrete classification "religion." The "religious" aspects of the lives of Native Americans can be only roughly categorized into separate considerations. Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into "religious" or "sacred" is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process. A statement made by a Hupa woman testifying in 1954 before a committee of the United States Senate gives partial insight into the Indian concepts:

. . . To most people, hunting and fishing is a sport. To the American Indian it is a part of a religious custom. The American Indians are a very pious—I do not like the insinuations of 'pious'—but they are a very religious people. We did not believe in a church just one day; we believed in a church every day of the week and in every act that we did. And we have continued with that belief. Therefore, even the taking of food was a religious sacrament in a way, particularly in regard to the hunting of the deer. We had a set custom that we followed in the conserving of it and the way we used the meat and our sharing it with others and so forth. [U.S. Congress, Hearings before the Joint Subcommittees on Indian Affairs of the 83rd Congress on H.R. 7322 and S. 2749, 1954:453].

It is also important to realize for the purposes of this study, that descriptions which single out specific cultural

sites as isolates (e.g., Doctor Rock, Chimney Rock, Peak 8) are distortions of Indian conceptualizations of these important cultural properties (see discussion pp. 10, 11, 72, 73).

The emphasis of this report has thus far been the delineation of events and features of Native American life as these features relate to uses of the project area. In many cases, seemingly unrelated elements have been shown, in fact, to be closely interrelated. Nowhere is an awareness of such interrelationship more important than in the examination of the religious life of the peoples concerned, and of the relationships of religious beliefs and practices to certain geographic zones and regions within the project area.

Included below are discussions of the major ceremonial events and of the philosophical precepts upon which these are based. Many of these events stress the quest for rejuvenation of the world, the community, and the individual. In the latter case, particularly prescribed training and preparation practices were and continue to be rigorously observed. Since such training is an integral aspect of the religious use of the high country, these training practices have been described at some length. Many general references to uses of the high country appear in this section, although a more formal correlation of cultural uses with specific zones, regions and sites within the project area is made in the accompanying chapter (2) on Ethnogeography.

**Major Ceremonies and Myths**

Northwest California cultures possess a religious complex generally called World Renewal whose purpose is the stabilization and preservation of the earth from catastrophe, and of mankind from disease. These goals are expressed through the great dances held at specified times and places in the region—at present by the Karok



and Hupa and, in the past, by the Yurok as well (Drucker 1937:257; Kroeber and Gifford 1949:5; see History p. 174, 177 & 178).

It is believed that these ceremonies were initiated by the pre-human spirits who are said to have inhabited the world and to have brought all living things and culture to mankind. These figures are called *ixkareya* by the Karok *woge* by the Yurok and *kixunai* by the Hupa (Powers 1976:35-39). The Karok told of their *ixkareya* being guides for human behavior, and the Hupa spoke of the *kixunai* being afraid of contamination by mortals (Harrington 1932:8; Goddard 1903:76, 1904). The tolowa also spoke of similar beings (Drucker 1937:268).

Traditionally, myths concerning these supernaturals, and the songs which accompanied each myth, were held to contain a spirit and were often "owned" by individuals or families. In these myths, origin stories are interwoven with events from daily life to explain how things came about, some of these myths are parts of the formulae recited at ceremonies performed by individuals or groups. The Yurok myths,

. . . belong to a time period when the earth was inhabited by a race of being called *woge* . . . small humanoid beings who reluctantly yielded the earth to mankind. There is an eerie sense of nostalgic sadness and loss whenever the *woge* are mentioned . . . the *woge* withdrew into the mountains or across the sea or turned into landmarks, birds, or animals in order to escape close contact with newly created man. Yet the *woge* are still present in some sense, and they are depicted as being glad to be called upon (in ritual formulas and the like [Dundes in Kroeber 1976:xxxii]).

World Renewal ceremonials involve a number of specific functionaries and possess particular characteristics of form and setting. An indispensable participant in the World Renewal ceremonies is an individual

(a formulist or medicine man as defined on p. 51) who recites set narratives at specified places in a fixed order. He is required to purify himself by abstaining from water, sex and profane activity for a period of time and is obligated to fast, isolate himself in the sweathouse, and to use tobacco or angelica root as part of the purification process (Kroeber and Gifford 1949:3; Goddard 1903:81-87). A necessary part of the World Renewal activity is the pre-dance preparatory medicine made by the medicine man at specific sites in the high country (for discussion see Kroeber and Gifford 1949; also see Charlie Thom 1978 for reference to contemporary Karok World Renewal ceremonies).

The major World Renewal dances performed are the White Deerskin and Jump Dances. Kroeber has described these ceremonies as follows:

1. All major dances are put on each day repeatedly, by several parties or teams providing separate regalia and competing with one another . . .
2. These parties are spoken of as each representing a town; namely, normally the town where the dance is made, and from one to five other towns in the neighborhood traditionally designated as providing a dance.
3. Anyone, from anywhere, may do the actual dancing or singing; it is the people who collect the regalia and contribute them to equip the dancers of their party who control and 'own' or constitute a party. . . .
4. . . . the group is regularly named as headed by the head of a house . . . the primary native association of the traditional hereditary right to make and control a major dance party is with a house (as expressive of a social unit) or with its acknowledged male head.
5. This does not, however, exclude from participation or control individuals not living in the par-

ticular named physical structure, provided they are related by known descent to the house group which traditionally leads or represents its town in equipping its dance party.

6. Regalia are normally lent to each such dance-equipping house or town group by its traditional friends in other houses of the home town, in neighboring towns, and in towns which control parties in major dances elsewhere; with reciprocation when a dance is held in the district of the lenders. This reciprocal assistance goes on across 'tribal' or speech lines much as within them.

7. The family or families controlling the representation of their town in a major dance by the equipping of a dance group are also responsible for the feeding of the out-of-district lenders who assist them, and of the singers and dancers who perform for them. They are primarily or morally responsible for the feeding of such visitors in general as do not have relatives or prior friends in the town of the dance, or of those who do not bring their own provisions. And they are evidently responsible for getting together the payment with which the mourners of the year must be satisfied before the pleasure of a festivity may be indulged in without giving deadly offense to such mourners (Kroeber and Gifford 1949:126-127).

Elements of their formulations (e.g., hereditary rights, importance in loaning of regalia, reciprocal assistance within and across tribal or linguistic lines, responsibilities for feeding visitors, and payment to mourners) continue to be an integral part of present-day Northwest Indian ceremony (TCR Field Data).

Fire once played a part in these World Renewal ceremonies. On the last night of the Karok ritual, while the Deerskin Dance was being performed, the sacred mountain (Mt. Offield) was fired. The mountain was believed to

be an immortal woman whose "hair" was singed so that there would be neither widows nor widowers that year. In 1939, one of Kroeber's informants, an older Karok woman, stated that since the White man's regulations prevented the Indians (Karok) from kindling the fire on Mt. Offield and the Deerskin Dance had stopped, food had become scarce and the Indians were dying off (Kroeber and Gifford 1949:21). At the Panamenik (Karok White Deerskin) ceremony, a fire was also set on the last night on the mountain facing Orleans.

Dancers danced to provide an abundance of food, universal good health and repair to the earth:

It will be pleasant weather everywhere in the world . . . The good food will come again . . . By means of it the people will live happily. This sickness which the people used to have they will have no more . . . [Goddard 1904:228].

These dances are performed at the sites where the pre-human figures are said to have first brought certain gifts to man. Dances are a reaffirmation of the gifts which the people had been given by the spirits and a technique for removing evil from the world by reestablishing balance to the earth. Wealth enables families to support these ceremonies, and the rituals allowed the wealthy to confirm their prestige through display. The exact relationship of wealth and display in Northwest California ceremonies has been open to various interpretations in the ethnographic literature, however (for discussion see Bushnell and Bushnell 1977; the discussion on p. of this report is also related). Local TCR consultants readily took exception to the analysis proposed by Kroeber during his work in the area, in which he stated that Yurok dance regalia were "wholly unsymbolical and in no sense regarded as sacred" and that they "comprise the most valuable things in the world known to the Yurok" (1925:54). Consultants reiterated that these statements



were in fact untrue or at best misinterpretations of information received by Kroeber. In fact, consultants state, the regalia are highly sacred and are of extreme value to the Yurok because they are regarded by them as living spirits and sacred objects. In addition, consultants felt that such anthropological emphasis on material wealth has led to other misinterpretations or distortions of field information. One consultant stated, "Dances are our religion." Another said that when ceremonies are held, the people pray about everything, for the salmon to come, for the acorns to grow, for the presence of all kinds of game, and for children to grow up to be good (TCR Field Data).

Yurok Deerskin or Jump dance sites are located at the following locations, among others: Weitchpec, Kepel, Sregon, Pecwon, Wohtek\*, Rekway, Welkew, and orek\* and Gans Prarie. The Karok traditionally have held dances at: Inam', Katimin, Amaikiam and Panamenik. The Hupa also dance at many sites in the valley (Kroeber and Gifford 1949; Pilling 1978:149). (For associated myths see A. Kroeber 1976:22, 38, 57, 58, 161, 198 among others.)

Other ceremonies were also important in Northwest California life. The Yurok opened the Klamath River every year, using herbs brought from the high country (Pilling, personal communication, March 1979). The Yurok Hupa and Karok had a "first salmon" ceremony (Kroeber and Gifford 1949). (The Hupa also performed a first eel and first acorn ceremony [Goddard 1903:78-79].) The Karok held that first salmon ceremony in the spring at Amaikiara (for associated myths see Kroeber 1976:218-222).

The Kareya [a religious man] Indian retires into the mountains and fasts the same length of time as in autumn. On his return the people flee, while he repairs to the river, takes the first salmon of the catch, eats portion of the same, and with the residue kindles the sacred smoke in the sudatory. No Indian

may take a salmon before this dance is held, nor for ten days after it, even if his family are starving [Powers 1976:31].

A TCR Yurok consultant stated that the first salmon ceremony was "wonderful"; all the people were out waiting for the first salmon to be speared. "The people fast during this time, and the children would be there and they would feed them." "They [children] don't need to fast—they don't know [about the meaning]." She stated that the older people prayed all day and everybody came, lining both sides of the river. "After the first salmon was caught everyone began to catch them. Then when they all looked up the mist started and this was the "tinkling" of the sky. The sky was weeping in sympathy. This is how the Indians felt about these things. These are stories that people still learn" (TCR Field Data; for an associated myth see Kroeber 1976:218).

The privilege of giving dances was linked to blood inheritance, and owning regalia was not equivalent to having the right to give a dance. A consultant explained that not everyone can give dances, only those who have the right to do so. Those who inherit the privilege may be unable or unwilling to give the ceremony. Sometimes those with inherited rights can join with others who have the means and equipment to do so. Rights and privileges surrounding dancing and ceremony continue to be respected today (TCR Field Data).

In some cases structures were associated with dances and a building might be constructed or rebuilt each time a ceremony was given. For example, the Karok constructed a U-shaped wall of dry stones at Inam'. "The U-shaped wall is precisely what northwest California shaman doctresses use at one stage of their training in the mountains" (Kroeber and Gifford 1949:128). This wall resembles those high on mountains believed by the Yurok to have been built by the spirits (Kroeber and Gifford 1949:142). The Inam' wall was shoulder high and faced the sacred moun-



tain, Astexewa, northwest of Clear Creek (Kroeber and Gifford 1949:11). High water washed the wall away each year, making its reconstruction necessary every time a ceremony was given. The Karok designated a special individual to repair or rebuild the U-shaped structure (Kroeber and Gifford 1949:128).

In previous times the various dances lasted from five to sixteen days, and as many as fifty dance groups performed. The dances became increasingly impressive as they progressed since the wealthier regalia owners displayed their best regalia towards the culmination of the dance. One of the greatest of all these dances was a part of the construction of the fish dam at Kepel (Waterman and Kroeber 1938; Kroeber and Gifford 1949).

Another dance form was associated with hostilities between groups and has been referred to as a War Dance. At the conclusion of hostilities, settlement had to be made by both sides. Negotiations were entered into and the men dressed for the War Dance, which could be a dance of incitement, of settlement, or of purification for those who had killed human beings (Drucker 1937:265). If the War Dance was not interrupted by further hostilities, then payments were exchanged, these being "cooked" by the fire the matter was supposed to be settled, and no resentment harbored, although this was not always the case (Spott and Kroeber 1942:182-189; Kroeber 1925:126).

#### People with Power

In Northwestern California two major social categories of people with "power" can be discussed. The first is that composed of "doctors" and includes those persons who have the ability to cure ill patients. The second category includes those who have acquired personal "medicine" for a particular purpose, exclusive of curing the sick. Today such individuals are often called "doctors," too. Both of these categories include persons who have been trained in the high country, and only those who train in the mountains are said to achieve great power. This section contains

a detailed discussion of these two categories of people with power with a particular emphasis upon training. Emphasis is given to the role of high country training and experiences as they relate to the acquisition of power by these practitioners. A third category of people with power, that of "Indian Devils," will also be discussed. Although Indian Devils are an important aspect of Northwest cultures, there is a noticeable paucity of data on this subject in the ethnographic literature, and TCR consultants were even more reluctant to discuss devilry than doctoring.

The word "doctor" is a locally accepted term for any of the esoteric practitioners who have had high country training. For purposes of clarity the term "doctor" is used herein to refer to a spiritual specialist who achieves "power" through trance from an order other than the "natural" world. For the Yurok these doctors were women. Other kinds of "doctors" are herein referred to with a modifier signifying type, such as "herb" or "mourning." The description may or may not signify the same order of "power" as "doctor." The term "medicine man" here refers to male individuals (commonly called formulators or priests) who are ceremonial practitioners. This category is different from that of persons who sought particular expressions of power, such as that for "good," "long life" or "strong." These latter persons are here considered as "medicine makers." Medicine makers also sought medicine in the high mountains. Making medicine is defined following Buckley:

... as an homogenous constellation of physical, mental, and vocal actions, and experiential events, undertaken or sought in a religious manner and frame of mind, the purpose of which is to maximize the practitioner's potential (i.e., "power") to act in a desired direction, or to live in a desired way. It invariably involves . . . the practitioner's experiencing contact with supernatural forces, either generalized or specific. While medicine making may incorporate

given ascetic acts, and prescribed rituals, prayers, or ordeals, it is, in the purest sense, an inwardly experienced moment of intense awareness and, in the more lofty (or "High") medicines, of transcendent understanding. A man or woman might, then, carry out all of the prescribed actions, and yet not "make medicine;" that is, not experience the requisite inner state [Buckley 1977a:340].

Another kind of practice, difficult to categorize because of the reported overlap in experience with other types of power, is that of sorcery. Those persons who practice sorcery are locally called "Indian Devils," the term that will be used here. "Power" is defined here as a particular expression of a universal energy.

#### Curing Doctors

There are several ways of obtaining "power," a particular expression of a universal energy. Every Yurok child is born with a "fire," which is a manifestation of the universal energy, or "spirit." Everyone has this "fire," or "spirit," and he/she also has a "soul," a more individuated spiritual element, as well as a body and a mind-element. However, the "fire," which is also the "spirit," is part of the "creator," the universal energy, or "spirit." Some people get an extra portion of this "fire" which can be thought of as a natural proclivity for power. Another method of acquiring extra "spirit" can occur after birth. Among the Yurok, it is believed that the "soul" enters the body ten days after birth, at which point the child is recognized as a human being. At this point a High Man or doctor can "shoot" the child with power, giving the child an added increment of spirit and, hence, added potential for power (Buckley, personal communication, November, 1978; TCR Field Data).

In addition to the potential for acquiring power at birth or soon thereafter, a person may inherit potential power: the ability to train for doctoring. Another way of acquiring this potential for power is through the possession of a natural gift or proclivity. These persons are said to be born with power, as opposed to those who have been selected for training on the basis of their inheritance. Persons who possess this natural calling always have rights to training over those who have simply inherited the gift for power (TCR Field Data).

Although doctors, usually women, often come from a family whose members had previously produced doctors, each individual must seek the realization of this power on her or his own. The regimen required of a person training for doctoring is too strict for many people, even though becoming a doctor is an avenue to wealth. One TCR Yurok consultant said, "I had to fight against being a doctor. I drank water so I couldn't be a doctor. I had foresight to see future events. I foresaw an automobile accident. It was terrible. I woke up in the night singing doctor songs. That's why I drank water, to keep from being a doctor" (TCR Field Data, for an associated myth see Kroeber 1976:64).

Those who seek to be curing doctors must first experience a "vision" in a trance or dream state. During this state, the novice is given guidance by the appearance of person or animal and also the gift of a "pain." The "pain" is an animate object introduced into the novice's body during the vision. Training follows during which the novice learns to bring forth this pain and control it for use in curing patients. The doctor usually possesses pairs of "pains" which are used to draw illness out of the bodies of others. Some Indians state that no one actually volunteers or is appointed to become a doctor; "One is called." A TCR consultant said one should be humble and wait for one's



power. He said "I believe it (Indian religion) is going to get stronger in the next ten years" (TCR Field Data; for an associated myth, see A. Kroeber 1976:84).

In the course of training for power acquisition, the aspiring doctor is to dance in a sweathouse for a period of ten days under the guidance of an older doctor. During the dance, the doctor learns to control her "pain," and she is herself considered ill until she does so. This is called "cooking the pains" to make them amenable to her control. The Kick Dance, used by the Yurok, Karok, Hupa and Tolowa, is associated with this procedure (Kroeber 1925:63; Drucker 1937:258; Spott and Kroeber 1942; Goddard 1903; Powers 1976:67-78).

In the summer following this dance, the novice goes to the mountains to a stone seat or enclosure where she spends the night in dancing, usually accompanied by another doctor or assistant who watches over her. Another Kick Dance follows her return from the mountains, and then she is ready to enter the profession of a doctor:

A doctor's first pain may come to her unsought in a dream, but may also be acquired when she is dancing in solitude in order to obtain power. To get its mate she goes to one of the mountaintop half-enclosures of stone which the Yurok called *tseksel* and which in English they often speak of as seats. There she dances again, still alone, but under guard and at night, until, the guardian spirit having put the second of the pair into her body, she goes out of her senses again and has once more to be taken down to the 'cooking' *remohpo* dance in the sweat house. A strong doctor may ultimately acquire many pairs of pains; but the foundation of her ability and her strongest pains are the first two pairs [Spott and Kroeber, 1942:156].

Strong Doctors, i.e., those of greatest power and highest prestige in the past, were the sucking doctors. (For an associated myth see also Kroeber 1976:64).

Women doctors traditionally commanded high bride-wealth and usually accumulated wealth for the family (for an associated myth see Kroeber 1976:232). A doctor obtains the highest fee possible for his or her services, but cannot refuse to treat a patient. In the past, any death resulting from a doctor's refusal to treat a patient made the doctor liable for damages, and inability to effect a cure resulted in the fee being returned to the patient or family (Kroeber 1925:35). A narrative about a woman from a house in Rekwoi (Requa) details her experiences in becoming and practicing as a doctor, and tells that upon her unhappy death, she returned as a spirit to Oka, Red Mountain, to live (Spott and Kroeber 1942:219-223).

The connection between the acquisition of powers and spirits in the mountains is evident in many accounts of the experiences of doctors (e.g., Spott and Kroeber 1942). There is a particular orientation towards the east, or inland toward the mountains (*helkau*), which repeatedly occurs in Yurok stories. The mountains are sacred, the locales of power upon which the doctor can draw (Spott and Kroeber 1942).

One TCR Yurok consultant, when asked how a person learns to become a doctor, said that one went to Doctor Rock. He said that sometimes a young girl will dream, perhaps that she has swallowed a water dog or a snake. This makes the girl ill. In turn, the experience "makes you dance — and you dance all night. You just keep on dancing for ten days in the sweathouse and that way you get power in your head. You get enough power to go back to Doctor Rock." He said that one would stay at Doctor Rock for ten days, but he did not know how long it took to get there — perhaps two days. Consultants indicated that one started at lower elevations and "worked up" to the "high places" to achieve full power (TCR Field Data).

A personal narrative tells of a doctor with one pain. To become "well," she had to go where a dream told her she



would find the rest of her power. "So, later, she went up to *Ha'aig oklo*', on Doctor Rock, back from Blue Creek; and there she got the second one of the pair" (Spott and Kroeber 1942:154). Fanny Flounder, a renowned Yurok doctor of recent times, sought power from the mountains:

But after she had her first pain it was still necessary for her to 'go inland' (*helkau nusoton*). This is like 'passing an examination' or proving oneself. This she did only after she had had her first pain in and out several times and had it pretty well under control. She went up the peak on which *wogel-otek* is, but to another part of it on the south side called *Tseksel otek*. It is so called because there is a *tseksel* there—one of seats or semicircular rock walls where the *woge* used to sit down and think. Beside doctors, men can go there to acquire luck. This *tseksel* is big enough to permit one to sit within it and stretch his legs in any direction. Its open side faces south. . . .

Then Fanny stepped into the *tseksel* and danced just as she had danced when first seeking power, stretching out her hands in all directions. All that night she did not stop dancing. Occasionally she shouted. When she danced more slowly she clapped her hands together. Her mother had told her, 'When you shout you will hear all kinds of things from inland (*helkau*). But say, 'No, I did not come here for that.' Toward morning perhaps you will hear them singing the *remohpo* [doctor dance] from the mountains. Then say to them, 'That is what I am here for.'

Then, as the night wore on, she danced harder and harder, and heard the sounds from inland more plainly and shouted, 'I wish that when I doctor, any sick person will become well (*wokteu niwa'a soksipa*). I am glad, you will give me the power' [Spott and Kroeber 1942:160-161].

The *woge* spirits led her back to the sweathouse. Her mother, a doctor who had accompanied her, left the basket

into which Fanny had spat out her first pain and her old maple bark dress in a nearby tree fork and her pipe in the back of the stone seat on the mountain. She blew tobacco inland to the mountains and poured more tobacco on the ground. It was believed that the spirits of the dress, the basket and the pipe were taken by the *woge* and that this would insure that the souls of doctors would go inland to live in the mountains after death (Spott and Kroeber 1942:160-161; for a narrative on Fanny Flounder's training see Valory 1970).

The doctors draw their powers from the *woge*-spirits who went to the mountains with the coming of humans to the earth. In death, the doctors' souls follow the path of the *woge*-spirits to the mountains. The high places, then, are the focal source of curative power for those who live in Northwest California.

In the past, disease was thought to be caused in several interrelated ways: the presence of semi-animate objects ("pains") in the body; unconfessed sin or breach of taboo; witchcraft; poisons placed in food; or by a doctor who wished to earn more money (Kroeber 1925:67; Drucker 1937:258). Modern disease theory, while accepted, has not changed basic curing patterns. The doctor diagnoses the precise cause of an illness before beginning treatment. The patient is placed by a living-room fire with assembled family and friends gathered to sing and watch the cure. The doctor smokes tobacco in her pipe and dances until reaching a state where she can divine the cause of the illness. Breaking of a taboo has to be publicly confessed.

One Yurok consultant said that "When a person gets sick, it's something bad you've done. If the patient can't or won't tell he won't recover." This consultant told a story of a woman who was sick and called in Fanny Flounder who saw in a vision that the woman had hidden poison in the rafters of her house. After the woman confessed, she was

cured and the deaths in her family stopped. It was remarked by another consultant, in discussing one family which had had an unusual number of deaths, that someone must have done something wrong in the family to have caused this series of deaths (TCR Field Data).

After public confession of breaches of taboos (those pertaining to death or sex, usually), the doctor would effect the cure. She removed the "pain" from the affected part of the patient's body with her mouth. The pain would then enter the doctor's body, and she would vomit it into her hand or into a basket, exhibit it to the people, and then dance until it disappeared (Kroeber 1925:42).

One Yurok consultant related an instance where a doctor's dreams would not let her rest. She and her family were called to a local Requa residence to help sing Kick Dance songs for Fanny Flounder. Her brother sang a bird song, the "right song" for Fanny's dance. Fanny spewed up a "bird," blue on the outside with a golden breast, which lay breathing in the basket. All the people present viewed the bird which was then placed in the basket on the mantel. Fannie put her pipe to her mouth, made a "long sound" while taking a deep breath which sounded like two pieces of wood being struck together. At this point the basket circled in the air and then fell to the floor, empty. The consultant explained that Fanny had inhaled the bird through her pipe. The men "helped" her and the singing continued until she became "calm" (TCR Field Data).

The general training and curing techniques used by the Yurok were the same for the Karok, Hupa and Tolowa although less evidence exists for the practices of the latter groups. Doctors from one tribe are sometimes called on by another tribe as experts in special cases (Drucker 1937:257; Gould 1978:134). Traditionally, those who could withstand the discipline for becoming a doctor could look forward to wealth and success, the basis for social prestige among the peoples of the study area (DuBois 1932:257).

One story tells of a Tolowa man turning to doctoring when he was humiliated at a Yurok White Deerskin Dance because he was of low birth and of no social consequence. He went:

. . . into the mountains, back to the very highest mountains where the bear, panther and wolves were plentiful. All alone he went to where there is a large rock which we call Hah-i-o-claw, and he remained there for three days singing and praying, then with nothing to eat he wandered on through the wild timber and brushy country, back to Crescent City, . . . and proclaimed himself a doctor . . . [Thompson 1916:182].

The Karok have a number of "medicine mountains" which doctors have traditionally used for validation of their powers. Anasuweihiviyak (three sharp black rocks) is at the head of Nordheimer Creek. Others are near Mt. Offield, Inavaheya, Katimmavaheya and Unfunoka (at the head of Pearch Creek and used by doctors from Panamenik). Mountains on both sides of the Klamath have been used by doctors in the region of Clear Creek and Inam. Among the Karok, doctors

acquired and kept their status by performing the ceremony of mountain pilgrimages, which were usually accompanied by the doctor dancing in the sweathouse. Women doctors have in recent times outnumbered men doctors, and this probably holds true for earlier times [Harrington 1932:8].

Pilling (1977:9) cites letters from the Forest Service files which indicate that Mt. Offield, due to destructive action by Whites, can no longer be used as a medicine-making site, but local Karok TCR consultants stated that the site continues to be used for other purpose such as World Renewal. The Hupa also have their own sacred mountains, the most notable being Trinity Summit to the east,



but there is another to the west of their valley which is used by doctors and luck seekers.

Northwest California groups have other types of curing doctors as well, e.g., dancing and/or singing doctors. Some doctors buy or inherit a formula. They might diagnose a patient, although not "cure" him (Goddard 1903:65; Drucker 1937:258). There are also doctors who treat only with the use of herbs, and root-doctors who use potions and poultices (Powers 1976:26; Harrington 1932:232). Angelica root is a favorite medicine of these doctors. It is used when steaming a patient, along with a recital of a formula (Goddard 1903:67; Powers 1976:86; for instructive myths on uses of herbs for curing see Kroeber 1976).

During field research, TCR consultants stated that herb doctors continue to use various plants to effect cures. Several consultants spoke of self-administered herb cures (TCR Field Data).

#### Personal Medicine Power

A person might seek supernatural help through proper ritual behavior at certain spots which were reported to have specific types of power. Fasting and abstinence from sex and water were part of the ritual of gathering sweathouse wood in the hills. All tribes in the study area observed this practice. Crying while gathering sweathouse wood is a traditional part of the ritual (Kroeber 1976:45; for an associated myth see Kroeber 1976:188).

The gathering of sweathouse wood was a religious act thought to bring the gatherer good fortune (Driver 1939:386). Gathering it was a means of acquiring 'luck' or money (for an associated myth see Kroeber 1976:251). Constant thinking of money while gathering wood was considered morally desirable because this was supposed to bring economic success:

According to a Karok myth, the sweat house, its restriction to men, and the practice of gathering firewood for it, were instituted in order that human beings might acquire and own dentalia [Kroeber 1925:41].

It was believed that sweathouse wood gathered from the high country gave greater power to the sweating for which it was used. Consequently, men made great efforts to bring wood down from the highest places possible. The higher the place the sweathouse wood was gathered the greater the power that came from sweating with it. Although sweathouse wood varied in species, manzanita or oak were the most common (Driver 1939:386). The medicine being sought governed the species burned (Pilling, personal communication, November 1978). The ceremonial sweating itself was done twice daily, in the morning and late afternoon, and was followed by a bath in the river. Men also used the sweathouse and its stone porch as a workshop to make nets or weapons (Driver 1939:385).

The man who devoted himself to ascetic practices in many cases also hunted for woodpecker scalps, the furs of albino or other unusually colored deer. He could achieve a certain amount of wealth through this practice. Visiting sacred sites and reciting formulae also reinforced a man's search for "luck" which translated into material possessions that brought social power (Spott and Kroeber 1942:227).

Stories were told of men gaining "luck" after seeking the "high places" and of prospering after that. One Yurok man found an amulet in the mountains which brought him a lifetime of "luck" (for an associated myth see Kroeber 1976:336).

The mountain Malul is like the mountain that the white people call Doctor Rock, which is also north of the river; and women would go there to become doc-



tors, as well as men for luck [Spott and Kroeber 1942:169].

Each tribe's area contained traditional lucky places for seeking different kinds of luck. Those seeking medicine for bravery bathed in remote mountain lakes to achieve extra-ordinary physical powers (Kroeber 1976:77). Higher elevations were believed to have the most power:

Now the young man went to one place only, the summit of Tewolew . . . He only looked about on the rock, and thought how beautiful it was, and then cried more [Kroeber 1976:188].

One Hupa tale relates that a young man went to a place near Trinity Summit where a waterfall came over a rock and formed a pool. After bathing there, he always won at gambling (Wallace 1948:354).

By showing proper respect and following ascetic practices, the person seeking luck would be granted advice by the woge of the mountains (for an associated myth see Kroeber 1976:291). Individuals who went through with the correct self-discipline could tap the power the woge possessed and gain supernatural blessings:

Later, when they went off with the woge, one went to the mountain Oka [Red Mountain], the other to Lohlko, a mountain near it. That is why that mountain is so good. If a poor man goes there for sweathouse wood, he calls to it; after ten days, he can get what he calls for, wealth or gambling luck [Kroeber 1976:414].

Numerous forms of personal medicine-making for power were described during the course of TCR fieldwork. There is medicine for felling a tree. Several consultants know of people who once had this kind of power. A formula was recited, then there was a flash of blue-green light, and the tree was felled. One consultant knew of a person with the ability to fell a tree growing on a slope and

leaning downhill, making it fall uphill with his power (TCR Field Data).

One of the medicines of great importance is a medicine for alleviating personal bereavement. This was used in a rite for people who could not recover their equipoise after duly mourning a death. The practitioner was paid for this ceremony. While the details of the practitioner's actions during the rite are not known, it is known that they had a high country training aspect. The name of this medicine-person is the word for 'inland mountains' (Buckley, personal communication, December 1978; Pilling, personal communication, November 1978).

There are a great many other sorts of "powers" related to mountain training. Yurok weather doctors had formulas for dispersing fogs. Karok also had weather medicine. According to one consultant, diving in an alpine lake constitutes an important aspect of making medicine for "strong," one of the lower levels of medicine. Among other mountain medicines are "thunder" medicine for "brave," and "earthquake" medicine for strength. There were medicine men (as well as doctors) who sang for power in the mountains with their hands raised above their head and their feet off the ground (TCR Field Data; Buckley, personal communication, December, 1978; Pilling, personal communication, November, 1978).

There was also women's menstrual mountain medicine which took place at a lake accessible from everywhere between Pecwan and Weitchpec. Women went here on their first menses to perform a puberty bathing ceremony, and the more powerful women practiced this medicine all their lives. After reciting a formula in their village they went to "bathe in a spirit lake in the sky." This lake is probably in the peripheral area of the high country (Buckley, personal communication, December, 1978).

A variety of personal medicines might be sought in order to influence a number of aspects of daily life. In

addition to those already discussed, medicine can be sought by individuals wishing to achieve success in stick games, singing, dancing, hunting, gambling or love, for "good" and "long life," for "philosophy," and for spiritual enlightenment ("high medicine"). From the previous discussion it can be seen that a number of kinds of non-curing medicine are sought in the high country. These forms of power are distinguished from curing powers in that they are not used specifically for curing individual illnesses. These are but a few of the many kinds of medicine powers which are acquired in the high country. These kinds of medicines are most often made by men, and are proceeded by purification practices (TCR Field Data).

A person who is in training for making medicine cannot eat with any people with whom he is not intimate, because those people may be menstruating or having sexual relations or be associating with people who have been doing these things. The training is a period when pollution is particularly contagious, so it is best to eat alone, to cook your own food or to have a post-menopausal woman cook for you. Such a woman is considered to have lost interest in sex and is, in fact, sociologically classified as a male. For a person who is seriously involved in training, it is a very difficult and lonely life (TCR Field Data; for an associated myth see Kroeber 1976:232).

Any serious trip to the high country is preceded by a ten-day purification period of fasting and praying, traditionally in the sweathouse, under the instruction of a trainer. The person may be doctored at this time in order to "clean him up" in preparation for the trip. At this time the individual confesses his mistakes, rids himself of grudges and bad feelings and gets back "in the middle" before starting the trip. A major purpose of working vigorously in the purification procedures is to allow the individual sufficient power to enter the high country. During this period, the individual waits for acknowledgment of the

spirits which can come in the form of a dream, a sign, or a vision. By such signs the spirits recognize the sincerity of the quest of the individual and sanction that quest in the high country. The high country training is a long-term endeavor involving a great deal of preparation, both on the part of the initiate and of the trainer (TCR Field Data).

Such training/doctoring which takes place prior to beginning the trip into the high country, involves what might be termed "a community support system." A person who makes medicine in the high country may be said to be achieving more than just personal medicine. He may also be achieving knowledge or a skill which is of benefit to the community. In addition, any achievement of medicine is viewed by the remainder of the community as adding to the total store of medicine/power within that community. In this manner, villages gain recognition through the amount of power-related knowledge and skill held by its membership. Communal interest is thus very important (see also Bushnell and Bushnell 1978:131-132). Only a very few individuals ever make medicine, for instance, on Chimney Rock. However, it is important to understand that the entire community has a vested interest in the success of those few individuals, whether they be doctors making medicine at Doctor Rock or Chimney Rock, or men making "high medicine." In either case, the community will benefit, and thus is supportive of the person seeking power when his or her quest is not secret (TCR Field Data). This relationship between medicine and the community is reflected in the recent statement by a Karok man who reports that since he is not in the best physical condition he has disqualified himself from attempting the powerful Pikiavish medicine because "the condition I'm in might affect the people" (Thom 1978:150).

One enters the high country to make medicine at a walk or a run. The trainer sometimes follows the medicine-maker at a distance. Every step of the way is important:



"every step of the way you learn something." A TCR consultant states that vehicles may not be used. Often the trip itself is full of difficulties and tests the individual's endurance. The person is tested by dangers along the trail, by bears, for example, or by tempting food. It is also important that the seeker take the appropriate trail, which depends upon the type of medicine sought as well as the seeker's abilities (TCR Field Data).

One way of entering the high country is to "run up." The following account was given of such a run: After a long period of training and purification downriver, the person in training ran up river to Kenek, the spiritual center of the Yurok world. In a sweathouse near Kenek, he sweated and scraped down with a hard black stone object and stayed for ten more days. Having a vision of his ultimate destination, he then ran up the Golden Stairs trail to Doctor Rock and then on to the place near Chimney Rock that he had seen in his vision (TCR Field Data).

It is particularly important that individuals on their first medicine quest in the high country be accompanied by their trainers. The reason given for the trainer's presence is that he may have to save the student from making a disastrous mistake: that of getting the wrong (negative) power, or one which could cost the student his life, or, possibly, his mind. (This, too, is why training must be very gradual.) A second reason is that the trainer may "shoot" his power into his student when the student is ready to make his medicine. This gives the student a "boost" for making the necessary connection with the spirits involved (TCR Field Data; also see Kroeber 1976:64 for an associated myth).

It is also important that the seeker not look into the eyes of passersby along the trail, in order to maintain his purity, to protect innocent persons from the medicine one has, and to maintain secrecy. If a person who has no medicine at the time is in contact with someone who is at the peak of

power, the powerless person is put in grave danger. This contact also interferes with the person who is experiencing power.

Again, when a man leaves the seat or medicine area and descends to his camp he does not talk or notice anyone along the trail. For example, his eyes are kept down; he does not look into the eyes of anyone along the trail, and does not let anyone look into his eyes so as not to disturb concentration. Eye contact would spoil the effort by bringing the person too quickly into a world in which he does not yet care to be.

Privacy is emphasized in the high country. One means of insuring this is through building rock piles (see Chapter 2, Ethnogeography, and Part III, Archaeology). The rocks physically warn the medicine-maker if anyone is coming, since if someone who is not pure (who has had sex, is menstruating, has been drinking water or alcohol) is met inadvertently, the entire effort is spoiled. Another warning is to lay a freshly cut manzanita bough across the access trail to the specific area. This directs someone coming into the area to turn back (TCR Field Data).

When in the high country the medicine maker uses a number of techniques to induce trance states. One of these is the use of "Rhythm Sticks" made of yew wood. These are beaten in constant rhythm to get the person into the mental framework which allows him to be receptive to the spirit from whom he is seeking inspiration. He might concentrate his mind on seeking a vision similar to someone else's past vision. This might be done at a ceremonial site to "pull the ceremony back," but is normally only done in the high country.

The paraphernalia necessary for certain vision quests was once kept in a cave underneath Doctor Rock. An individual could, in trance, run from a low place down by the river up to Doctor Rock. The paraphernalia would be cached at this locality for his use, in case he had not



brought what he needed with him (Pilling, personal communication, November, 1978).

It was once common for an individual to make medicine at Doctor Rock or Chimney Rock and then to take a break, relax, and talk with his teacher at Summit Valley (see Chapter 2, Ethnogeography). Here the person reviewed his experiences to determine which aspects were important and which were not. For example, very specific details would be related at this time, such as the movement of a particular cloud, or a song which was heard. Training in observation is begun with very young men so that details of medicine experiences can be caught when they occur.

Men sometimes take women with them. These women may stay in one of the "debriefing areas," (e.g., Elk Valley or Summit Valley), while the man is making his medicine, usually for three days, at one of the medicine localities. The women stay in these neutral areas and when the man completes his "journey," the woman is available to nurse him back to health following his exertions.

After the establishment of contact with the spirit world through the initiatory run and medicine making, a man may go back to his "place" periodically to strengthen his power, to accumulate more spiritual energy and reaffirm his understanding (TCR Field Data). Failure to achieve a medicine goal is considered a sign of pollution. In such a case the practitioner would be bringing angry spirits home which would result in a tense situation with both the trainer and the community.

Gaining luck in gambling was one reason for undertaking the rigors of going to the mountains to fast. Skill and luck in gambling was one method of amassing wealth. Social status changed with gambling luck:

No matter how high may be the intellectual and moral worthiness of the reigning chief, let the lowest vagabond of the tribe win his money from him in a game of 'guessing the sticks' (in these days, in a game of

cards), and retain the same a certain number of days, and he practically succeeds to the chieftainship, such as it is [Powers 1976:67]

The usual game is the hand game, but different medicines are sought for different games. Women also gambled, but not to the extent that men did and not in order to achieve social elevation (Gould 1966:85). Gambling continues to be very popular among Northwest California peoples. Gambling sticks are still made in the high country and left there for a year to accumulate power from the spirits, who play with the sticks until the human owner comes to reclaim them (Buckley, personal communication, December, 1978).

#### Indian Devils

Today, as traditionally, some people of the study area are suspected of being evil sorcerers or "Indian Devils." Those envious of the good fortune of others are thought to do the fortunate harm. Poison compounded of noxious ingredients (salamander larva, rattlesnake venom, crushed dog flesh) might be introduced into the food of the victim, who will then die (Goddard 1903: 64-5; TCR Field Data). However, a powerful doctor can cure such a poison victim (Powers 1976:68; Kroeber 1925:67)

Indian Devils supposedly rob the graves of their victims to recover the power that caused the person's death. Their evil might extend to killing members of their own families. As a result, in the past some suspected Devils have been put to death. Sometimes a more powerful Devil was hired to kill one who was attempting to injure a family (Goddard 1903:65; Drucker 1937:260). Indian Devils gain their evil power just as doctors acquire their curing powers. Both fast, visit sacred areas and recite formulae. Although most curing doctors in Northwest California have been women, Indian Devils have been assumed to be men

(Kroeber 1925:137; Drucker 1937:259). However, field data indicate that several women are believed to have been Indian Devils as well (TCR Field Data).

Indian Devils might use a weapon described as a small bow formed of a human rib with a bowstring made of the sinews of a human wrist to magically shoot non-material arrow points into victims during the night. These practitioners are also invested with the power to change shape and become an animal. One Yurok consultant said, "I am scared of the Indian Devil; that is why I did not want to go over there in the mountains. You have to have lots of courage to go there. And if someone cries, you know that it is Indian Devil. Because it goes whoo, whoo. Then you know there is a Devil waiting outside and if he touches you, he kills you" (TCR Field Data). This might account for the belief that evil beings inhabit nearly every spring, wood, and ocean area (Drucker 1937:267-268). The Yurok traditionally disliked going into the deep forests, fearing the supernatural beings who lived there (Powers 1976:53).

During the course of fieldwork, several TCR consultants mentioned that even "good" doctors were sometimes suspected of performing "deviltry." One consultant said she had been made ill from someone's "bad wishes." That is, she had "the Indian kind of sickness." Her husband paid for a doctor to suck out her pains and to dance for her. The consultant said the old Indian people knew how to make poison for others. "They gave poison, they put dried frogs in the acorn soup that people eat and that caused them to get sick and die."

Two TCR consultants spoke of an Indian "game" in which a man wrestles with a tree, and indicated that this has supernatural connotations: the men gain strength for overcoming Devils through their practice (TCR Field Data). (Previously unpublished original source material on Yurok doctors and Devils can be found in Valory 1970.)

### Recently Introduced Religions

#### The Ghost Dance of 1870

The Ghost Dance, a religious phenomenon which began in 1869, swept many Indians along with it. The basic belief of this movement was that the impending end of the world would eliminate the White man, and that all the Indian dead would return. The cultural impact of the Ghost Dance on Indians was strong for a time. It gave hope in a period when their world was severely threatened by the encroachment of Whites on their territory and the associated political and economic changes (see Part II, History of Indian-White Relations).

Although the Karok accepted the new cult for a time, the conviction which carried many Karok people into the Ghost Dance was not strong enough to convince the Yurok of the validity of this new belief. Their fear of the dead and of ghosts was incompatible with the religion, and the ideas that one must dance continuously (to bring about the "end" of the world) and give up valuables was not in accord with their values. There was no basis for this new religion in Yurok history, and the Ghost Dance never became established among them. The Ghost Dance never penetrated the Hupa's valley, probably because their traditional religion continued to be very strong (DuBois 1939:23).

#### Shakerism

In the 20th century another new religion was introduced to Northwest California in the form of the Shaker religion, which is a compound of Indian and Christian forms. The movement originated in the Puget Sound area with the vision of an Indian named John Slocum. Shaking while undergoing religious ecstasy and healing are parts of this religion. Curing is an important element for members of this group, and the religion has attracted a wide variety



of Indian peoples. Individualistic in nature, this religion has undergone many changes since its inception (Barnett 1957:9).

Shakerism was initially in direct competition with the doctors because Shakers also conceive of illness as caused "pains" which can be removed from a patient by the use of the hands. One TCR consultant said,

My mother was doctor in the Shaker faith. She cured by laying on hands. When she healed a person, she took the sickness into her body for a week. It took some time for her to throw it off. The patient had to have faith to become cured. She was a doctor from the age of fifteen. She could do this because she had the power.

Jimmy Jack, the Yurok who brought the Shaker belief to Requa in 1926-27, stated that the pains removed by Shakers were the same as those removed by doctors (Barnett 1957:171-172). One Tolowa woman spoke of this resemblance:

. . . She saw a clear relationship between them—a conscious recognition which helps . . . to support the conclusion that at least some of the Indians see the Shaker Church as a way of carrying on older and more native practices [Gould and Furukawa 1964:59].

The Shaker idea that illness could result from soul loss was not unilaterally accepted by all Indians of this area. But it is generally believed that Shakers can remove magically implanted pains caused by Indian Devils (Drucker 1937:268; Barnett 1957:172).

Another TCR consultant said, "Shakers see visions." Many consultants believe that Shakers can see pains or illnesses in the same way that Indian doctors do. A Yurok consultant said that when he was ill a Shaker lady came to his house and asked if she could sing for him. She knelt down and began to cry. The lady then questioned the con-

sultant about any past wrongs in his family, and when an elder later interpreted the cause of his illness—which stemmed from an event long before his time—he was cured.

Shakers hold that one must believe in order to be cured. Although incorporating Indian religious elements into their rituals, the

Shakers do not encourage the following of native customs as a bulwark against the incursions of Western civilization . . . They will not have anything to do with native dances of a religious character. In California, members who persist in attending the native Deerskin, Jump and Brush Dances are upbraided and called hypocrites [Barnett 1957:142].

The Shakers also oppose any paying of fees for medical aid, a factor which increases the hostility of the doctors and the Indian Devils. The feasts held by Shakers after their larger meetings resemble those given during the World Renewal ceremonies. Shakerism tolerates White members, but it is considered an Indian-revealed religion (Barnett 1957:141).

When Jimmy Jack brought the Siletz Shakers to Requa, led by their elder, Jackson, he attempted to gain acceptance through a local Indian man of high status:

Jackson and his co-workers had set their hearts upon, and directed their greatest efforts toward, the conversion of Robert Spott because of his intelligence, his influence in the community, and his identification with the conservative Yurok element. Spott attended the meetings for his benefit and was overcome with shaking . . . but this only made him more cautious and resistant. From that time on he passively opposed the movement at Requa [Barnett 1957:77].

Despite this initial (and continuing) resistance, the Shaker message reached a number of Indians who had attended the meetings at Klamath and at Requa. Jimmy Jack built a



church near Klamath in 1927, and a small meeting was established at Johnson's. Tolowa attending these meetings organized their own church at Smith River by 1929, and by 1932 the successful curing of a Hupa led to the building of a church in Hoopa which was destroyed in the 1954 flood (Barnett 1957:80). The church at Hoopa has been rebuilt, and there is presently a Shaker church at Weitchpec as well as the others mentioned (TCR Field Data).

#### **Episcopal Church**

Several TCR consultants mentioned the fact that there had been an Episcopal church near Orleans in Karok territory which was destroyed by the Forest Service. Consultants repeatedly stated that they could not understand why the church had been razed. Some thought that the Forest Service simply wanted more land for their own offices. Consultants believe that this demonstrates disrespect for Indian religious beliefs, whether they are from the traditional religion or the Christian religion. According to TCR consultants, this removal of the Episcopal church continues to play a part in the distrust the Indians of the area feel toward the Forest Service's interest in their culture (TCR Field Data).

#### **Native American Religion Today**

Some Indians of the area presently belong to religions such as the Shaker and Episcopal described above, as well as other religions, e.g., Four Square Gospel, Catholic, and various Protestant denominations. However, many Indians do not participate in any recently introduced religion. Field data indicate that some Indians from all these religious categories have simultaneously continued to maintain traditional Native American religious beliefs. Despite enormous changes in the society, Indian participation in traditional practices has continued to range from

observation to full participation with deep religious conviction. The various traditional ceremonies have been differentially maintained by Northwest California groups. In the early years of the 20th Century at least some of these ceremonies were witnessed by non-Indians. The Yurok and Karok dances were witnessed (Kroeber and Gifford 1949), as were the Hupa dances (Goddard 1903) and the 1908-1909 Karok dances (Arnold and Reed 1957). The Hupa have maintained a regular ceremonial cycle through time; the Yurok and Karok have been less regular but have also continued their ceremonies. Now, as in previous times, there is cross-group participation in dance ceremonies, a practice which has helped to maintain religious traditions for those groups who have been less regular in their ceremonial round. Today, as in the past, highly skilled dancers are much admired and sought after as participants in ceremonies—regardless of group (TCR Field Data).

Today there is an increasing interest in the indigenous World Renewal ceremonies; these have recently been held at Clear Creek and at Katimin by the Karok. Regeneration of the Yurok Jump Dance at Pecwan is presently underway, and the Karok are hopeful of reviving the Amikiarum rites (TCR Field Data; see also Hampson 1978; Thom 1978:149-151; and Winter and Heffner 1978:15). A Deerskin Dance was to be held at Somes Bar in the summer of 1978 but was cancelled because of weather conditions (TCR Field Data).

Today, many people participate as singers and dancers in the various ceremonies. During the course of the fieldwork the reestablished Yurok War Dance was performed. The Brush Dance continues to be performed with people bringing out their regalia for these ceremonies. There were at least five Brush Dances held in the summer of 1978 (TCR Field Data).

Many TCR consultants state that Native American religious beliefs/values are still very much alive. One consultant said that religious power comes through the way people live, the way they think, and that one should have no jealousy. "One of our religious beliefs is that we don't expose our sacred practices. It is a personal thing." Another consultant stated that she believes that White people have cut off religion at one point but that Native American beliefs go beyond that point. "Now the Indians are reviving the old ways to the point that they have the power to enable them to fly, to send their souls elsewhere beyond their bodies and many other things too." This consultant states that she knows many people besides herself who have done this. In addition many other consultants referred to the concept of soul travel as an enduring feature of the belief system (TCR Field Data; for further acknowledgement of the resurgence of traditional religious values see Hampson 1978:6-7, statements by a Karok man [Thom 1978]; and Winter and Heffner 1978:15).

People seeking power continue to go to the high country to achieve personal medicine and curing medicine; "Indian Devils" continue to be incorporated into the lives of Indian people. Trained men use the high country today to strengthen, reaffirm, and/or make medicine. Older men sometimes go to the high country in pairs, sometimes alone, praying to "recharge their batteries." Older people function in this way as long as they can. There are at least four Yurok people in this "older" category using the high country today. Some of the persons using the Blue Creek area are Karok who were originally trained in the Marble Mountains, but their personal sites have been desecrated so they have switched to this new area for both training and practice (Pilling, personal communication, November, 1978; TCR Field Data). (A communication by Harry Roberts, a man who has lived in close association with the Yurok for over 50 years and has intimate

knowledge of high country sites also confirms that [in 1973] "These sites are still being used today, quietly, by individuals of three Indian tribes—Yurok, Karok, and Tolowa . . ." [Roberts 1973:1].)

There are present-day practitioners who could be classified as "inactive users" since they do not now walk to the area because of age or health reasons. Several consultants spoke of the ability (both past and present-day) to turn to the high country from a distance and derive a regeneration of power (TCR Field Data; A. Pilling, personal communication, November, 1978). Today, there are several Indian doctors in the area who practice various forms of curing (and one Wintu doctor in Redding to whom many local Indians go for curing). Training of doctors is not openly discussed since this is a personal seeking of medicine, and part of the belief system regarding doctoring requires that Indians avoid indiscriminate discussions about this sacred training. As has been pointed out by a Karok man ". . . Indian people are very confidential. There are lots of things that white society still doesn't know, and Indian people won't give out any information about it whatsoever" (Thom 1978:151). However, guarded references made by consultants regarding the continued training of novice doctors (reportedly six during fall, 1978) gives strong evidence that this religion is a viable one in Northwest California (TCR Field Data).

### Summary

As was previously stated, the ethnographic material in this chapter has been presented to develop background knowledge necessary for an understanding of past and contemporary uses of the project area. Cultural usage specific to the project area has been shown in terms of gathering foodstuffs, hunting, gathering of basket material, gathering of sweathouse wood, gathering of herbs for use in ceremonies in river and coastal com-



munities, and in the training and continued practice of acquiring medicine—doctoring and personal, and community centered. These uses can be shown to have continuity through time and were in fact being practiced at the time of this field research. In addition, the project area is the setting for many myths and narratives which are an integral part of traditional Northwest Indian religious beliefs and world view.

The data show a strong correlation between cultural values and progressively higher topographical areas. For example, the most desirable acorn and basket materials come from progressively higher altitudes, houses situated higher on a hill indicate higher social rank, sweathouse wood gathered in the high country will help to bring a corresponding increase in power, and similarly, increases in height above the river correspond with increases of power in terms of doctor or personal medicine quests.

The complex interrelationship of cultural elements is apparent from the research. These interrelationships are particularly important when considering the religious life of the people concerned. To understand Northwest Indian religious life/world view, an awareness of the correspondence between religious beliefs and practices and certain geographic zones, regions, and sites within the project area is necessary. It is with these corresponding relationships that the next chapter, Ethnogeography, is concerned.

## CHAPTER 2

### ETHNOGEOGRAPHY OF THE PROJECT AREA

This section delineates and describes those locales, regions and sites within the project area which have been determined to be of importance to the Native American communities concerned with the region. As has been described in the preceding section, the high country (see pp. 1, 73) is an integral part of the religious training of specialists and formulists and as such is important to the generalized belief system of the communities under consideration. This section discusses the attributes and characteristics of the various indentified sites and locales in the project area. First, the concepts and associated perceptions of the boundaries and internal ordering of the region which were elicited from TCR field consultants are discussed. Second, each site, region or locale is described in detail with an emphasis upon the attributes of that particular site and its uses.

Each of the sites in the high country is directly or indirectly related to the quest for power on the part of doctors or personal power practitioners (see definitions p. 51). As has been previously stated, training and use of the high country for medicine are intensely private experiences (see p. 63). Where requested, the strictures of privacy have been observed in this research. Restrictions set by consultants result partly from the very private nature of the religious experience and partly from a distrust about the use of such information by outsiders. Other ethnographers have noted secrecy in studies of Indian religions, not only in Northwestern California but elsewhere in the Pacific Northwest (Amoss 1977, 1978; Buckley 1976; for secrecy in the Southwest see Brandt 1977).



It is essential that site attributes be delineated prior to discussion of specific locales. A site can possess:

1. a visual, aesthetic perspective
2. a set of physical conditions
3. a set of sensory conditions
4. a specific human construction
5. or a combination of all of these.

A particular mountain may be the focal point of medicine but it is only a part, even if a central part, of the site. Standing on a "site" is not the total experience for those who seek the medicine. The quality of silence, the aesthetic perspective and the physical attributes, are an extension of the sacredness of that particular site. For example, one considers Doctor Rock, which is an important source of medicine in the project area, one must also consider that several locations near or on the mountain are very salient aspects of the sacred site, since all these locations are identified with the mountain.

Another attribute of sites within the project area is that they increase in sacredness as one travels from lower to higher elevations above the Klamath River. One cannot say, however, that lower sites are less important than the higher sites in the whole of a sacred area, since those who train in doctoring must progress through a sequential regimen that encompasses a spiritual journey toward power paralleled by the physical journey to the high country. The physical setting through which individuals journey to the high country depends just as much on a progressive stage-by-stage travel to the tops of mountains as their spiritual journey progresses stage-by-stage to higher orders of medicine. Local Indian people are concerned that without an understanding of this interdependence between the environment and the quest for power, sacred sites will be altered and desecrated to the point where no one can effectively use them either to train for doctoring or in personal power quests. One TCR con-

sultant said, "People who make decisions [concerning the environment] must walk the land, know the people, and learn what is important to them" (TCR Field Data).

#### High Country

On the basis of his research with Northwest Indian people, Buckley (1976) has defined the high country as the Peak 8-Doctor Rock-Golden Stairs and the Chimney Rock-Elk Valley-Sawtooth Mountains area as well as the ridgetop area connecting the two areas. Buckley stresses that the term "high country" refers to spiritual properties and not the altitude of the terrain (1976:1).

An "outer circle of medicine country" is conceptualized to include Red Mountain and Rattlesnake Mountain to the west, Pecwan Hill, Burrill Peak (Kewet), Onion Mountain and many other mountains along the bend of the Klamath to the south. Data are unclear for the eastern area of the "outer circle." The boundary of the area conceptualized to be the center of power crosses the low point of the present G-O Road on a northeast-southwest diagonal between the Summit Peak and Peak 8 areas (T14N R3E S26). The northern boundary encompasses Sawtooth Mountain and runs across a high shelf (R4E T14N S10). To the south the boundary is somewhere in the Flint Valley area. It is thought that Flint Valley may be outside of this most sacred area while Elk Valley is within it, and that the Serpentine Ridge between them is the eastern boundary. The area very likely also includes a corridor going up the Golden Stairs trail and up the Blue Creek Drainage, (Buckley, personal communication, December, 1978).

TCR consultants discuss the high country in a variety of ways, all of which give insight into their conceptualizations of the area. Consultants stressed the sacred nature and heavy power of the high country. Ideally, this area should only be visited by those who have gone through purification rites. Consultants consider this a very sacred

place that is dangerous to the unprepared because of the power that permeates the area. Consultants also said that when one is seeking medicine it is very important to avoid people on high country trails. One consultant stated that this area is the center of the world for Northwest California Indians. According to another, one should only speak of the high country in general terms because "it is a very private place." Consultants stated that although this area is not uniformly high in elevation, the entire area appears to funnel into the high peaks and shares, in a general sense, the sacredness of the very high peaks. Any intrusions into this area by outsiders is perceived as a violation of the spiritual purity that the high country represents. Consultants repeatedly confirm religious use of the high country. Some say it is a place for meditation. One consultant said that high places are important because "if you have trouble, if your mind is troubled, you meditate. You are surrounded by beauty. You get inner peace. You get rid of your burdens that are too heavy to carry alone." \*

Consultants repeatedly stressed that any changes of the area would destroy the concept of cleanliness and purity now attached to the high country (TCR Field Data). This concern stems from the previously stated fact that in Northwest California culture, the environment as a whole has important religious significance. There is a physical-psychological interaction that takes place between those

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\* Perhaps in some small way an analogy to this consultant's feelings can be found in the following statement by Lady Bird Johnson, commemorated on a plaque at Lady Bird Johnson Grove, Redwood National Park, August 27, 1969:

One of my most unforgettable memories of the past years is walking through the Redwoods last November—seeing the lovely shafts of light filtering through the trees so far above, feeling the majesty and silence of that forest, of watching a salmon rise in one of those swift streams—all our problems seemed to fall into perspective and I think every one of us walked out more serene and happier.

who go to get medicine and the sacred place which furnishes this medicine. If one feature of this interaction is disturbed, the flow of power is blocked. To illustrate, one TCR consultant was very disturbed that blasting was desecrating the sacred area (TCR Field Data; Buckley, personal communication, October, 1978; Pilling, personal communication, November, 1978).

The notion of desecration of the sacred high country is highlighted by the following analogy:

Empty beer cans and used condoms are about as appropriate on Doctor Rock as they would be on the altar of a cathedral; traditional Indian religion places great emphasis on abstinence from physical pleasures while seeking spiritual energy [Bright 1977:16].

TCR consultants are concerned that with increased access to the high country, there is increased possibility that the area will be "improperly" used (TCR Field Data). This concern for the future is reflected in a statement by a TCR Yurok consultant who expressed concern that her children or grandchildren might be called to be doctors and that there might not be a place for them to go when they are ready to receive power. In the words of a Karok consultant:

These areas need to be there when a new Indian person gets the "calling" to become a medicine person. Suppose the "calling" is received and the person arrives to find an army of tourists to take pictures and make tape recordings of a real live medicine person in the process of training. Also the trees are gone, the whole area logged off. The solitude and atmosphere for meditation is totally lost. How will that person train properly? . . . The culture has been torn apart by progress and now people are asking for the pieces to be torn in smaller pieces [TCR Field Data].



### Blue Creek Drainage

The sacred sites of concern in this study lie within, or border on, the Blue Creek drainage area. Indian peoples used this area as a source of food resources, manufacture resources and also for spiritual renewal. TCR consultants mentioned camping in the area, sometimes in very large groups. Some reported "camping" activity is for religious purposes. Consultants also refer to the area as having declined in quality. For example, one consultant said that in the past one could go up Blue Creek by boat but that such a journey is not possible today, as a result of changes in the creek. Another consultant said there is not enough water in Blue Creek now even for salmon to get up the creek (TCR Field Data). Jedediah Smith's party reported that in May, 1828 the creek was 25 to 30 yards wide and there were Indian fishing establishments on the creek (Murray 1943:48).

There were in the past, three villages on Blue Creek. One was "around the bend" from the mouth of the creek on the north side; another was approximately one mile up on the left side; the other village was where the "wild men lived." This description by a consultant included an anecdote about these wild men coming down the creek and stealing a girl for a wife. The wild men supposedly lived on the north fork of Blue Creek and were referred to as Indian Devils (TCR Field Data).

There are no known descendants of these Blue Creek villagers. The isolation of these villages and distance from the Klamath presents the possibility that these people who lived in this location might have exercised very high medicine (Pilling, personal communication November, 1978; For an early account see Crook n.d.).

### Rock Cairns and Tseksels

Two types of stone constructions have been identified within the project area which pertain directly to the religious/medicine quest uses of the region. These have been termed by various sources and TCR field consultants as cairns and *tseksels* (*cekce'i*). Cairns may be generally described as piles of rock which are associated with some sacred area or trail within the high country. Tseksels are stone constructions which have been variously described by consultants as semi-circular enclosures and as "seats." Positioning of tseksels with regard to various environmental features is apparently very important and affects the quality of the medicine quest activities for which they are used (TCR Field Data). (See also Part III, Archaeology and Appendix H.)

Two types of cairns have been identified in the project area. One type has been described as stone stacks which functioned as trail markers. An additional function is that of guiding "people coming out of a trance." These rocks are talked to and prayed to as they are set down. Such cairns usually consist of three rocks stacked vertically. The rocks psychically tell the person making medicine if someone is coming along the trail and also warn anyone entering the area that a doctor is training and that danger exists in the area since medicine is being manipulated (Pilling, personal communication, November, 1978). Such rock stacks may be found on any of the established trails which lead to high medicine places, such as Doctor Rock (see Part III, Archaeology, and Appendix H).

The second type of cairn consists of larger piles of rocks (more than three) located near the areas where practitioners train. These are not well documented in terms of function although it is believed that older women taught younger women trail courtesy at these cairns. Trail courtesy might include giving a prayer and leaving a fern



frond. Consultants stated that men using the area might leave stones and small twigs at these cairns (TCR Field Data; Pilling, personal communication, November, 1978). A possibility is that leaving rocks at these cairns insures luck for the practitioner. In such cases rocks might be stacked vertically on top of larger boulders or might be placed in clefts of rocks (Buckley, personal communication, December, 1978).

Tseksels are an extremely important aspect of the use of the high country (see Part III, Archaeology). Their construction and use has been recorded by Buckley (1976), Robin (1958), Spott and Kroeber (1942), Kroeber (1978), T. Kroeber (1974) and Wylie (1976). Tseksels are often referred to as "seats" and may be described as the site for the quest for medicine. As such they are carefully constructed according to a number of criteria in order to insure the proper experience in the quest.

Many TCR consultants stated that they had seen stone seats in the mountains. These were variously described as "a football-shaped world rock" where a doctor sat and as "rock circles" where doctors danced.

They left landmarks and stone monuments on the tops of high mountains, places commanding views of the surrounding country. These landmarks we have kept in repair down through the ages in loving remembrances [sic] [Lucy Thompson as quoted in Tolman 1966:85].

Theodora Kroeber (1974:162-163) describes a structure Robert Spott built at her home in the Napa Valley, which she called *tsektseya* ("altar") stating that Spott was pleased to have built such a structure so far from home. She describes the use of these structures by the Yurok in the following way:

The Yurok have numbers of structures in their own hills above the river at particular spots reserved for

them since time immemorial. They are places of retreat for a man or a woman who, seeking power, goes to them to pray, to cry, to smoke, to fast: in short to engage in ceremonial lonely ritual, these being places of solitary mystic communion. They are good places, Robert said, to sit and listen to the songs of different birds, learning from them to throw the voice high in the strangely frenetic falsetto singing which accompanies the sacred dances. More important of course, they are where one hopes to hear the distant Spirits who may listen and take pity on the one praying there, a place for gathering one's resources in many ways [T. Kroeber 1974:163].

*Tseksels* are varied in size and construction, apparently depending upon the type of medicine which is practiced in them. They may be very small (3 to 4 feet in diameter) or much larger (ranging to 20 feet in diameter). The structures are generally three-sided with an opening on one side but may be circular. Rocks are piled on bedrock and may be in the form of a low, loosely articulated wall or may actually form a wall of some height (TCR Field Data; Buckley, personal communication, December 1978).

The orientation of the opening of the seat was an important aspect of its use. The opening could face in any of the cardinal directions with any variation between, although, the tendency was to place the opening facing east with a lesser propensity to place them facing to the south. Pilling states that the east-facing seats were oriented toward Mt. Shasta which is said to give off a radiance or light which emanates from a point near the summit. The orientation to the mountain peaks in the distance is explained by the practice of calling upon the mountains to bring medicine. These prayers were offered to the mountains in a clockwise fashion from the Tseksels. Each prayer was individualized (Pilling, personal communication, November, 1978; Buckley, personal communication, December, 1978; TCR Field Data).

The position assumed by the user is also an important consideration. Buckley reports that users might dance within a circle of stones or might range to the outside of the circle. During such dancing, the user might face various points relative to the walls of the seat. Other ritual activities occur within or near the seat. Many of these are not known to the researchers although it is known that small fires are sometimes built where angelica roots and tobacco are burned. These are small fires and the ashes can be easily swept away. The various rituals are used for specific purposes. An individual is said to have a clear idea of the nature of the quest before entering the high country or occupying the seat. The particular rituals are then oriented to the purpose or quest of the individual on each trip to the area. The latter principle, of course, is related to the preparation for the trip before the individual enters the high country. Such preparations involve the trainer and sometimes the generalized community support system discussed in the preceding section (Buckley, personal communication, December 1978; TCR Field Data).

On some occasions seats are destroyed after use. This occurs when an individual has built a seat at a place which was foreseen in a vision and when the individual had gone to that spot for a special purpose such as guidance or training. An individual might destroy such a personal seat when it is feared the seat will be desecrated in some fashion (Buckley, personal communication, December, 1978).

#### Site Descriptions

In the following section each identified site is described and, where available, information regarding its use is given. Each of these sites must be considered a part of a larger network, or whole which is described in greater detail in the preceding sections of this chapter. The sites are described through information gathered from existing

sources and often from field data acquired during the course of this study. In some cases no new information was available from field sources and existing information has merely been summarized. The sites (Map 3) discussed are:

1. Malul
2. Turtle Rock
3. Sawtooth Mountain, Little Medicine Mountain and Serpentine Ridge
4. Red Mountain (Oka)
5. Doctor Rock
6. Chimney Rock
7. Peak 8
8. Golden Stairs
9. Bad Place
10. Lakes
11. Summit, Elk and Flint Valleys
12. Trails within the project area

#### Malul

Malul (Pecwan Hill) is a site which was mentioned by Spott and Kroeber (1942:168-169) but lies outside the project area boundaries.

#### Turtle Rock (also called Frog Rock)

No new data was obtained during the course of this study. Turtle Rock, adjacent to Elk Valley, was evidently another place where medicine was made and there was a wooden scaffolding erected on the face of this rock in the earlier part of this century. Tseksels are still visible in the area but none of the wooden seats said to have existed there earlier have survived. It is said that one Yurok had a personal seat built there at one time but destroyed it when he knew he would not return (Wylie and Heffner 1976:17).



#### Sawtooth Mountain, Little Medicine Mountain and Serpentine Ridge

All are located within Klamath National Forest, all were considered part of the high country and medicine was practiced at these sites (Wylie and Heffner 1976: 12-15). Consultants mentioned these locations when discussing the high country. It is generally felt that the aesthetic quality of these high places has been destroyed by timber harvesting. Consultants were very concerned that the same fate not overtake the Blue Creek high country.

#### Red Mountain (Oka) South Red Mountain

Red Mountain, also called Oka, has been reported as the site of ritual activity by Buckley (1976); Miller (1975); Spott and Kroeber (1942); and Wylie and Heffner (1976). Red Mountain was regarded as less sacred than Doctor Rock (TCR Field Data). Wylie and Heffner cite Harry K. Roberts as having seen "... literally hundreds of personal prayer-circles, rings of stone and several large medicine altars" on Red Mountain (1976:13). The story is told of a man who made medicine for strength on Red Mountain by "carrying a rock up there every day." He began with small stones when he was a very young boy and by the time he was a grown man he was carrying twenty- or thirty-pound river rocks up the mountain (TCR Field Data).

TCR consultants said people were training on Red Mountain during the course of this study. They also said there was a place to camp on top of the mountain. One consultant related that there is a place on top of Red Mountain where people go to pray for someone to die. One consultant said that all seats on Red Mountain should face Doctor Rock (see also Part III, Archaeology for this orientation). Consultants said that boys used to hunt on Red Mountain and that prior to severe alteration of the environment people gathered Indian potatoes and grass seeds at the foot of the mountain. Another consultant said

that hazel switches grew well there, as did the Regal Lily which is collected for basketmaking. This same consultant said that the Tiger Lily was gathered there and eaten as a vegetable. She said they only harvested big bulbs and left the others so there would be a crop the next year. One Yurok consultant whose grandmother was a "medicine women" said her grandmother used the "whole area" from Red Mountain to Little Medicine Mountain to gather herbs for her medicine (TCR Field Data).

A Karok consultant said that at the beginning of World Renewal ceremonies at Panamenik runners would carry salmon from the mouth of the Klamath over Red Mountain in relays to Katemin. According to a consultant there are seven tseksels on South Red Mountain. This mountain is also associated with gambling power (TCR Field Data).

#### Doctor Rock Area

The Doctor Rock area is located at the head of the Golden Stairs Trail. Bright (1977); Buckley (1976); Spott and Kroeber (1942) and Wylie and Heffner (1976), among others, describe Doctor Rock as being a focal point in traditional spiritual life.

This is the one area located in the high country that all consultants know about. It is known as *Ha'eh klo* (Haeokolc, Hey gu Kloc) in Yurok. It is clear that when consultants speak of Doctor Rock they are talking about an *area* in the high country, although they also refer to one basalt outcropping within the area as Doctor Rock, conceptualized as an integral part of the surrounding area. This area includes several features. The "Doctor Rock" labeled as such on official maps is within the Doctor Rock area but is not the rock known to local Indians by this name. A cleft rock located roughly one mile to the south is known to the Indians as Doctor Rock. These definitions have been derived from TCR consultant responses to the





question: "What do you mean by "Doctor Rock?" These specific localities are hereafter referred to as Doctor Rock (cleft) and Doctor Rock (men's—the site is designated as Doctor Rock on official maps). The general area is referred to as the Doctor Rock Area (Map 3).

The Doctor Rock Area is composed of many individual localities which are used by the Indians for various purposes. This listing includes only those places which TCR consultants specifically mentioned in their discussions of the Doctor Rock Area. Doctor Rock (Cleft) is the area where women train to become doctors and dance to acquire medicine. Although men are reported to use it too, this site is primarily associated with use by women. Consultants indicated that the point officially labeled as Doctor Rock (i.e., men's) is more closely associated with men who use the high country for personal medicine. This is not to say that this is the only location in the Doctor Rock Area used for the purpose of gaining personal medicine. There is a cave and/or tunnel, used by men, located under Doctor Rock (men's). There is also a spring in the Area. Women stored their pipes at a basaltic outcropping described as "down from Doctor Rock" (cleft). There is a site "off from Doctor Rock" (cleft) where women danced, and a place near the spring north of Doctor Rock (cleft) where people camped. A pool used for ritual bathing is also in the Area. Besides these specific places, consultants also spoke in general terms of many other places in the Area where people made personal medicine. Many consultants chose to be deliberately vague about specific locations of sacred places because it is culturally inappropriate to discuss such sacred sites. Other consultants stated they did not know the exact locations of sacred places because they had not undergone the proper training. All consultants, however, were cognizant of the Doctor Rock Area (TCR Field Data).

The Doctor Rock Area is primarily used by the Yurok, with some use by Tolowa and Karok. The Hupa have a parallel use at Trinity Summit, a sacred location some distance to the south of this area. The Karok used other such places located in what is now Klamath National Forest. These have been desecrated, however, and Karok are now limited to using sites in the Six Rivers Forest for personal medicine although Mt. Offield continues to be used for World Renewal (see p. 57).

Doctor Rock (cleft) where women trained to become doctors contains a seat (tsektse) and a walled area (which may be another seat). Some consultants said doctors danced at these seats (see also Spott and Kroeber 1942; Valory 1970). One Yurok consultant who stayed a month at the Doctor Rock Area during the 1930's, said that the women danced on a flat, red clay area that was swept clean by the wind ("spirits"). Another consultant emphasized the fact that the dancing area was floored with river rocks (indicating that they had been carried from the low country to the high country). (Note: Consultants mentioned those who trained for medicine running up the mountain carrying rocks, see p. 80). Several consultants spoke of women going to this area for training. One consultant stated that her aunt (it is not clear whether her aunt was a doctor) almost died on a visit to the area because she "received too much power." Consultants continually stressed that Doctor Rock (cleft) is a place where doctors *must* go to receive the highest form of curing powers; this area was also known for having connection to ritual and the ten-day fasts that were a part of training for medicine. One Yurok consultant said that an important part of this experience of Doctor Rock (cleft) is the difficulty of "getting there." She also stressed that people *need* to go there to achieve peace of mind. This locality is, she said, a part of the ocean: "It is not far from the beginning; you can look to

where you came from. You have a view of your home place; you can see the ocean or up river." Gambling power was never attained at the seats of this rock (cleft). However, people did pray for "luck" on the sides of the outcropping (TCR Field Data).

The cave or tunnel where men go (under Doctor Rock [men's]) is said to be a place that has the sound of the ocean in it. This cave also has a steadily dripping water source. Men go to this cave to achieve a trance state for (unknown) medicine purposes. According to consultants this cave/tunnel has been partially destroyed by the vibrations of logging trucks passing by and by blasting in the area. It is currently said to be almost impossible to enter (TCR Field Data).

Men go to Doctor Rock (men's) to achieve medicine in gambling, hunting, fishing, and individual success or material success, long life, and for a good family life. One consultant said "... there is a stream at the bottom of this place, ... you can hear the sugar pines sing; ... they sound like breakers rolling." It is said that "luck" is achieved by clapping your hands three times after making the wish at a proper place near this rock outcropping. Three clear echos indicate that your wish is granted (T. Buckley, personal communication, November, 1978). There is also consultant information indicating that this is a "weather doctoring place" and that abuses of the rock will bring snow to the area. (See also Winter and Heffner 1978a.) According to consultants there is presently one person in the area who has the ability to manipulate the weather by going into the high country. Some consultants believed that bad medicine could also be made at this location.

There is one location in the Doctor Rock Area that is used for ritual bathing. This is a small deep hole used by those who are there to attain medicine. Those who accompany the doctors who are training camp north of the Doctor Rock (cleft) and use the springs near their camp for bathing. This camping place is an essential area for the

support team accompanying the doctor. When a doctor is training, he or she often does not have any connection with the "real world" during part of the medicine quest. Consultants spoke of the necessity of doctors having support people to see that they do not run off a cliff or starve to death. One woman stated that her father had to be reminded to eat the ritual acorn gruel given to practitioners in training so he would not completely lose his strength. Traditionally, this ritual gruel was used so seekers would not dehydrate during the ten-day fast period. In a sense, the people who camp near the sacred rocks are there to see that the trainers come back.

One camping area was located at a miner's cabin, near the present-day Forest Service cabin. There is a spring near this site creating a small pool to which a person might run when "hit with power." Some consultants believe that the water in this pool fluctuates in elevation with the ocean tides. This pool served as a source of drinking water for the area (Buckley, personal communication, December, 1978).

Women training at Doctor Rock (cleft) traditionally have had a "support crew" composed primarily of men, but with at least one experienced woman doctor in attendance to offer expert assistance. Thus, it can be seen that women doctors in training are supported by the community, members of which are in helpful attendance during the experience in the high country. Buckley offers the additional analysis that many of the activities of women doctors are aspects of religious life normally performed only by men, such as smoking, using the sweathouse, and wearing feathers (Buckley, personal communication, December, 1978).

The locality described as "down from Doctor Rock" (cleft) is where pipes and other paraphernalia were left. In the past, paraphernalia was left in sacred places for use of



those suddenly overtaken by the need to go to the high country for medicine. However, this practice is no longer common because non-Indians have either moved these articles or contaminated them for use in the training procedure. For example, one consultant stated that a White man who had picked up a flint in a sacred area, later became ill. The man consulted an Indian doctor who asked if he had taken anything from the sacred area. At first the man denied taking anything, but later admitted he had taken a flint. The doctor told him to return it. He did, and was cured. Local Indians believe that anyone who goes into the area without proper preparation is walking into danger. During the course of this study TCR field archaeologists collected and removed artifacts from the area but not from specifically identified ritual sites. Nonetheless any removal is perceived by local Indians as improper and a dangerous intrusion into the area and such intrusion is highly resented. In fact TCR consultants reported that a person undergoing medicine training had complained that the presence of Forest Service personnel, anthropologists, curiosity seekers, and others in the high country during the summer of 1978 effectively disrupted the training even though the traditional ten day fast had been participated in by the trainees (TCR Field Data). Two ethnographic researchers made one visit to the Doctor Rock under the guidance of two local Native Americans. They were met by the archaeology crew at the trail entrance and this crew accompanied them into the area. The ethnographers felt this trip necessary in order to experience the Doctor Rock Area and thus acquire a more complete understanding of the cultural properties under investigation. It is recognized that although the ethnographic researchers made every effort to approach the area with the proper respect, their presence may have also been disruptive of local religious practices.

It is extremely important to understand that Indians who go to the high country to pray are praying for the good of all mankind, for the harmony of the entire earth, not just for the Indian people. This might explain the statements of some TRC consultants who said that they do not understand why those people for whom they pray are some of the very people who seek to destroy this sacred high country by changing the existing environment. The following quote is illustrative of the setting and nature of some of these prayers:

How do we maintain our natural resources? Take the fisheries or any of the living things—trees, rocks, streams, animals, human beings of all races—all of those things are prayed over from the highest medicine mountains. From Chimney Rock you can see a lot of different high peaks; the tip of Mt. Shasta, the tip of Preston Peak, a very dim view of Mt. Whitney. You can see all the way to the ocean around the Crescent City area when there is no overcast. Heavy prayers are put on all those places. All the medicine mountains for the people around here are visible from that spot. Medicine Mountain in the Marble Mountain Wilderness, the Trinity Alps, Salmon River country. You can see all that, all the tips of the Siskiyou Mountains can be seen, and they're all prayed over. Everything's prayed over, Doctor Rock is right in view of Chimney Rock. Everything that we go through. Fasting—not eating for several days, very little liquid, maybe some acorn soup. Sweating to become purified before you go in there, so that you're very clean. Those things are very true. You take a prayer that's very strong that an Indian believes in, and you'll find that it's followed with stronger belief than any other religion [Thom 1978:148].

Several people have left their names at Doctor Rock (men's), either on little slate tablets or written on the rock surfaces (TCR Field Data and see Archaeology Chapter 9

and Table 12). This practice also is mentioned with regards to Chimney Rock. These are the only known areas in the high country where this occurs, and is perhaps an indication of the special nature of these locations. One consultant related that the writing constitutes an appeal for a good and long life (TCR Field Data).

Consultants made clear that during World War I, World War II, and the Korea War, the Indian doctors went up to the high country to pray for those from the area who had gone into the service. Those who were prayed for survived these wars (TCR Field Data).

The sacredness of this area cannot be overstressed and its integrity as a "pure, clean place" is a part of the psychology which forms the mental set of the Indians who practice and believe in the Northwestern California Indian religions.

#### **Chimney Rock**

Chimney Rock is located in the northeastern part of the project area directly west of Elk Valley. According to consultants, a rock wall about four feet high has been constructed on this brownish outcropping. Consultants said that medicine makers stand there and that there is also a place just below this wall where someone else might stand to watch. There is a fire pit nearby. This location is apparently sometimes used as a training ground for doctors, but is primarily associated with Karok men. However, consultants spoke of one Tolowa woman doctor who used Chimney Rock in her power quest (TRC Field Data). Generally, Chimney Rock is considered by most to be too strong for women seeking power. It would have to be an extremely unusual woman to make medicine there (Buckley, personal communication, December, 1978).

Men go to Chimney Rock to pray for accomplishment and success. Local Indians believe that there are many places on this rock, each of which represents a different kind of power. They also believe that different spirit-beings

reside at these locations on the rock (Buckley, personal communication, November, 1978). One TRC consultant said that lightning hits here and that the rock is inhabited by very hairy people who are disturbed by any loud noises made at Chimney Rock. Consultants specifically remarked that stick/hand game players come here for "luck" and success (TCR Field Data).

Buckley reports that the Yurok may have a broader geographic notion of the area called Chimney Rock. He feels that they may in fact be referring to the lakes between Chimney Rock and Sawtooth Mountain and Elk Valley as well as Turtle Rock and Chimney Rock; these may comprise the Chimney Rock area (Buckley, personal communication, December, 1978).

A lake near Chimney Rock is referred to as "Baby's Foot." It was reported that at this lake an individual who had failed in the medicine quest could be pulled down into the lake by an old woman and there turned into a baby (TCR Field Data; Buckley, personal communication, December, 1978). Another lake is said to be the home of the "thunders," who give men powers of strength and bravery.

#### **Peak 8**

Peak 8 is considered to have the most powerful, and hence the most dangerous, medicine in the area. This peak is situated 3/4 of a mile north of Doctor Rock (men's) at the opposite end of the Golden Stairs Trail. One reaches the peak after a long steady climb. The peak is referred to as the "center of the spiritual world" and is used by a man only after that individual has achieved very high powers. Few people are considered strong enough to attempt to use Peak 8, although Buckley reports that one contemporary male practitioner desires, eventually to "make Peak 8 medicine" (Buckley, personal communication, December, 1978).



Peak 8 is used to achieve contact with the universe. It has been said that the peak is located below the "hole in the sky" and that an individual could fly through the hole in the sky and into the heavens. Peak 8 is considered very dangerous and it is felt that only one person per generation is capable of achieving the kind of power necessary to attempt the use of Peak 8. This knowledge is very esoteric and restricted, and as such it is perhaps the most important. A person using the peak is in extreme danger and can be easily hurt, a factor which serves to restrict its use (Buckley, personal communication, December, 1978).

#### **Golden Stairs**

According to a TCR Yurok consultant, the Golden Stairs are considered a corridor (ladder) between the earth and the heavens. Pear Pen village is located at the base of the Golden Stairs and is considered by Pilling to be the "highest" of the villages in the area because of its proximity to the corridor. The location of the Golden Stairs is detailed in the following section on trails in the project area (Pilling, personal communication, November, 1978; TCR Field Data).

#### **Bad Place**

This location is north of Doctor Rock (men's), and is a basalt extrusion in a depression. This is the only specifically named area of five localities where a consultant said bad power could be obtained. Consultants said that rattlesnakes and poison arrows can be found at Bad Place. They also said it is a place where people go in order to do harm to another person. This location is associated with death and revenge, and is referred to by some consultants as a "devil rock." One consultant said that if someone is killed in your family, you go to the Bad Place and recite certain prayers so that the killers will be punished. Local

Indian people said that they avoided this area and most preferred not to discuss this location (TCR Field Data). The Bad Place is reported by Wylie and Heffner (1976:3) as a place where important rituals take place.

#### **Lakes**

TCR consultants stated there are lakes in the area of Chimney Rock which were formed by lightning striking the flat, exposed rock. These lakes are spiritually significant and they are connected with the ocean so that changes in the level of the lake waters are related to the tidal changes of the ocean. This belief is reflected in a story of a serpent which has its head in the ocean and its tail in the mountain lakes. The head of the serpent is said to enter the ocean at Stone Lagoon, near Trinidad (TRC Field Data). Other lakes in the vicinity of Chimney Rock are said to be the home of the Inland Whale, a central figure in Yurok mythology (A. Kroeber 1976; T. Kroeber 1974). This may be an indication of a conceptual connection between "high" and "low" country.

#### **Elk, Flint and Summit Valleys**

TCR consultants said that Elk and Flint Valleys were traditional deer hunting areas, and that there were camps in the area for this purpose. One consultant also stated that these valleys once provided grazing ground for the Indian peoples' livestock. Another consultant said that people went to these valleys to practice dancing as a part of doctor training. According to another consultant there was a campground at Elk Valley where several people stayed to give help and support to "the religious people." Based on consultant information, Flint Valley functioned as a resting place for those using the high country.

Elk Valley and Summit Valley were visited by husbands and wives to reaffirm their marriages after abstinence



from sex due to doctoring or personal medicine seeking. Peoples of the area gathered hazel sticks and nuts and blackberries in Elk Valley, and fished and gathered pine nuts in Flint Valley. A TCR consultant thought that Elk Valley was a place where men practiced running (TCR Field Data).

Karok and Yurok had intertribal council meetings in Elk Valley and camped in Flint Valley during these meetings. Flint Valley is thought to be a home of the little people, and the woge are said to have gone into the spirit-world from this valley (Wylie and Heffner 1976:6).

One of Pilling's consultants spoke of an "oven" which was observed some five years ago in Elk Valley. The consultant realized that this find indicated that "traditionalism" was still active. He believed that shin bones of deer were cooked in this "oven" and that this is related to a power-gaining ceremony, although the consultant was not sure to which ceremony this should be attributed. A common place for such ceremonies is in a saddle lake area near Onion Lake. Other of Pilling's consultants are reported to have seen the oven, which is believed to have been built around 1970 or 1971 (Pilling, personal communication, November, 1978).

One TCR consultant said that her grandfather went to Summit Valley to pray. She also said that war parties went in groups to the valley and that it was used for intertribal "councils." A consultant said that he and his teacher both made medicine for "philosophy" at one end of the valley. At one time all of the peaks and prominent rocks in this area had either a prayer circle or stone altar on them (Roberts in Wylie and Heffner 1976:16). Several consultants indicated that this was a gathering place for food—brodiaea—wild onions and wild coreopsis—and also for basket materials like bear grass (*Zygadenus* spp.), and willow shoots (*Salix* spp.). Summit Valley was used as a resting and "debriefing" place for those who had gone

for power to other places and then returned to Summit Valley to recuperate (Buckley, personal communication, December, 1978; TCR Field Data).

#### High Country Trails

Every Yurok village had a "way" to get to the higher country said one consultant, as did the "Katemins" (Karok) and the people from Smith River (Tolowa). TCR consultants confirmed a series of interconnecting trails used by all Northwest California Indian trade routes connecting coastal and inland villages, or trails which took them to particular resources in the high country, such as stone quarries, particular collecting grounds or hunting areas. (For an historical reference to the discovery of "secret and carefully concealed paths by which the different tribes communicated with each other." see Bledsoe 1881:31). Certain trails are still important for religious use. Of particular concern is a trail known as the Golden Stairs which leads persons seeking power from Blue Creek to the Doctor Rock/Peak 8 area. Several consultants remarked that these interconnecting trails were once used by local Whites and that the CCC roads were later built along these same trails. In fact, the Gasquet-Orleans Road is believed to follow an Indian trail rather closely. This series of interconnecting trails in the high country is but part of a trail network throughout the area which once facilitated the rich economic and social life of the Northwestern groups (TCR Field Data). TCR Field data collected on these various high country trails is outlined below.

Of particular interest is the trail that leads to the Doctor/Peak 8 area. This trail, the Golden Stairs, is the main route traveled, by doctors and others seeking power, to this highly spiritual area. Several trails connected with the Golden Stairs. People from down-river villages once could go by boat up to the mouth of Blue Creek and then follow the Blue Creek Trail, or they could follow trails which led

into the Blue Creek trail at various points. Connecting trails from above the mouth of Blue Creek were mentioned by consultants as being from Johnsons, Pecwan, Martin's Ferry, Weitchpec and Bluff Creek. TCR consultants said that one can take a boat from the upriver villages down to Johnsons or to the mouth of Blue Creek and then follow the trail up to meet the Golden Stairs. The Johnson's trail and the Blue Creek trail are considered by consultants to be the main trail. Many said the shortest route is from Johnsons (TCR Field Data).

There was a trail, used by downriver villagers (Yurok) from Terwer, downriver from Klamath Glen (and one from Turip/Starwein above. These trails led into the mountains through the Red Mountain area and on to trails connecting to the Doctor Rock Area. One consultant said that the famous Yurok doctor, Fanny Flounder went to Doctor Rock (cleft) via this route, going from Requa to Turip by boat (TCR Field Data).

The trip to the high country along all of these trails was in itself important. Traditionally the trails were kept cleared of brush and rocks. Clear trails were particularly important for safety since those using them were sometimes in trance and/or running (TCR Field Data).

According to Buckley (personal communication, December, 1978) there were once two sets of trails into the high country, "high" trails and "low" trails, which corresponded with "high" and "low" medicine, but which lead to the same locations. It is important that one who is making "low medicine" should use the low trail to the Doctor Rock Area for example. In addition, there are songs for the trails which have a relationship with the trail. It is said that the songs for the Chimney Rock Trail are higher than those for Red Mountain.

Several TCR consultants spoke of the Golden Stairs. One said her grandmother told her, "One sees where it starts, but not where it is ended." Her grandmother told

her it went to heaven and that nobody ever got to the end of it. Another consultant told of her trip up the Golden Stairs in August of 1935. She travelled with five other people, partly on horseback. On the first day they journeyed from Requa to Johnsons and then to a place called Cedar Camp. They heard Indian Devils at this camp. From Cedar Camp they went along a ridge then to the "fording place" (on Blue Creek) where the water was "chest deep" and they had to look for a place to ford the horses. They then followed a trail on the "other side" of and along Blue Creek to the "forks" of Blue Creek, passing Bear Pen (there were horses there) along the way. They stayed two nights at the forks of Blue Creek where they caught trout and picked huckleberries, made bread in dutch ovens, and the men hunted. They gathered more huckleberries along the trail up to Martin's Hole. There is a forbidden lake above Martin's Hole where nobody should swim because it is "so full of water dogs" who get curious when people swim. "You can swim in that lake only if you are training." Martin's Hole is the last place water is obtainable until you get to the camping area (the cabin) above Doctor Rock (cleft). This consultant rode horseback most of the trip, but stressed that she walked the Golden Stairs (TCR Field Data).

Specific trail information obtained from Yurok consultants follows. This data was obtained primarily by having the consultants point out trail locations on a map. Other data are from detailed trail descriptions. This data does not preclude the existence of other trails in the area. The trails are presented here as they were described by consultants, i.e., "There was a trail from \_\_\_\_ to \_\_\_\_," and thus represent trails as the Yurok envision them.

Johnsons into the high country: This trail goes up the hill from Johnsons to the NE ¼ of Sect. 5, T11N, R3E; it then follows a ridge to the head of Pecwan Creek at the point where the headwaters of Pecwan Creek and Bear



Creek are opposite each other on opposite sides of the ridge. The trail then goes east along the Blue Creek Mountain Ridge to Low Gap (Sect. 22 T12N, R3E) which is located at the head of Indian Creek; the trail then goes north, downhill to the mouth of Slide Creek (and the uphill side of Indian Creek) at Blue Creek; the trail then crosses Blue Creek and at this point the trail forks. One fork goes from Blue Creek to Red Mountain; the other is the Golden Stair Trail.

**Pecwan to high country:** This trail goes from Pecwan up the ridge to meet the trail that leads into the high country from Johnsons. The trails converge at the center of the E $\frac{1}{4}$  of Sect. 5, T11N, R3E.

**Blue Creek to Red Mountain:** This trail goes from Blue Creek (opposite the mouth of Slide Creek) northwest up to Stevens Prairie (Sect. 32 T13N, R3E); it then goes northwest along the ridge to South Red Mountain (Sect. 19, T13N, R3E) and around South Red Mountain on the northwest side, then northwest to Red Mountain (Sect. 14, T13N, R2E).

**Stevens Prairie to Starwein Flat:** This trail goes from Stevens Prairie down the ridge past an acorn camp (Section 6) to the mouth of the West Fork of Blue Creek; the trail then rises up to Starwein Ridge; it then goes north, then northeast along Starwein Ridge; and then it goes down the ridge to Starwein Flat (Sect. 20, T13N, R2E); and then to Klamath Glen (Sect. 18, T13N, R3E).

**Blue Creek to Starwein Ridge:** This trail goes from the mouth of Blue Creek northeast up the hill, through Scofield Prairie and north and northeast to Starwein Ridge where it connects with the trail which goes between Stevens Prairie and Starwein Flat.

**Blue Creek to Thompson Prairie:** This trail goes from the mouth of Blue Creek in an easterly direction, then a northeasterly direction through Joe Prairie (Sect. 22, T12N, R2E) to Thompson Prairie (Sect. 20, T12N, R3E)

where it connects with the trail going north to Stevens Prairie. The trail then goes southeast for a short distance to a point near the headwaters to the West Fork of Pecwan Creek where it connects with the trail into the high country from Johnsons.

**Thompsons Prairie to Stevens Prairie:** This trail goes north down the hill from Thompson's Prairie to Blue Creek where it crosses the creek and goes uphill to Stevens Prairie where a short distance north it connects with the trail from Blue Creek to Red Mountain.

**Golden Stairs (Doctor Rock) Trail:** This trail goes from the mouth of Slide Creek (at the junction of two trails—the trail from Johnsons to the high country and the Blue Creek to Red Mountain trail) to Bear Pen (Sect. 3, T12N, R3E). It then goes north crossing the Crescent City Fork of Blue Creek, then continues north past a water hole (NE $\frac{1}{4}$ , Sect. 22); then northeast past Martin's Hole (NE $\frac{1}{4}$ , Sect. 14) and on to the Doctor Rock Area (Section 12). From here it goes north passing the cabin (mining cabin; now Forest Service cabin) and Bad Place (NW $\frac{1}{4}$ , NE $\frac{1}{4}$ , Sect. 12); and ends at Peak 8 (Sect. 1, T13N, R3E).

**Doctor Rock Area to Flint Valley:** This trail goes from the mouth of the Crescent City Fork Blue Creek about 1 mile up the Golden Stairs trail. It then goes "cross-country" to Blue Creek and follows Blue Creek in a northeasterly direction crossing it five times; the trail then ascends the hill on the back or south of Blue Creek and then descends to the East Fork of Blue Creek. From here it goes up the East Fork (in a southeasterly direction then in a northeast direction) to Flint Valley.

**Blue Creek to Flint Valley:** This trail goes from the East Fork of Blue Creek (juncture of trail from Doctor Rock to Flint Valley) and goes southeast past Nickowitz Peak and across Nickowitz Creek to Lonesome Ridge. It then follows Lonesome Ridge going east to Salal Spring; then north passing on the east side of Rock Creek Butte, and



then southwest to Dillon Camp and northwest to Flint Valley.

**Flint Valley to Elk Valley:** This trail goes from Flint Valley (at the junction of trails here from Blue Creek and Doctor Rock) north along Serpentine Ridge to "Serpentine Gap" located at the head of Medicine Creek, then down the hill to Elk Valley.

**Elk Valley to Summit Valley:** This trail goes from Elk Valley north to Chimney Rock and around the north side of Chimney Rock to Buck Camp Ridge, then south to the southwest of Chimney Rock to Boundary Trail and thence southwest to the Peak 8/Doctor Rock Area (where it passes on the north side); and proceeds northeast to Summit Valley.

**The Summit Valley Trail:** This trail goes north from Summit Valley to meet with the upper Smith River trail (see also Section III, C-2).

**Buck Camp Ridge Trail:** A trail connects at Buck Camp Ridge and goes north passing Sawtooth Mountain on the east and on to the Oregon border (see Section II, C-5).

**Pecwan to Blue Creek Mountain:** This trail goes northeast from Pecwan (Sect. 17, T11N, R3E) past Malul (Pecwan Hill) to Blue Creek Mountain where it joins the trail from Low Gap to Bluff and Deer Lick Creeks.

**Deer Lick Creeks:** This trail goes from Low Gap in a southeasterly direction following along Blue Creek Mountain Ridge past Blue Creek Mountain (where it meets the trail from Pecwan). Then it goes east to Laird Meadow and northeast to the confluence of Bluff Creek and Deer Lick Creek.

**Bluff Creek and Deer Lick Creek north to Lonesome Ridge:** This trail goes north from the confluence to Bluff and Deer Lick Creeks, by McDuff Camp and meets the trail from Blue Creek to Flint Valley at Lonesome Ridge.

**Orleans to Bluff and Notice Creeks:** This trail goes from Orleans up the hill between Crawford Creek and

Ullathorne Creek and northwest to Dyer Ranch and again northwest, passing Cedar Springs, to Cedar Camp and down to the confluence of Notice and Bluff Creeks.

**Klamath River trail to High Country:** This trail, now known as the Bluff Creek Trail, went north from the Klamath between Bluff and Slate Creeks at their confluence with the Klamath and north along what is now known as the Bluff Creek trail to the confluence of Bluff and Deer Licks Creeks and to Notice Creek where it joined trails connecting from the west, north, and southeast.

**Martins Ferry to Fish Lake:** This trail begins at Martins Ferry and goes up the mountain between Burrill Peak and Bee Mountain to Fish Lake.

**Martins Ferry to Blue Creek Mountain:** This trail follows the Martins Ferry/Fish Lake trail to Red Mountain Lake and then branches off going northwest past Divide Lake and Bee Mountain (on present-day Boundary Ridge Trail), around Onion Mountain and to Onion Lake and then north to Blue Creek Mountain where it meets with the trail going east from Low Gap.

**Morek to Boundary Ridge Trail:** This trail goes northeast from Morek between Devil Creek and Marecp Creek connecting with the present day Boundary Ridge Trail which goes from Martin's Ferry to Blue Creek Mountain.

#### Camps: (Mapped)

There was a *winter camp* used by the people from the mouth of Blue Creek at NW ¼, Section 29, T13N; R3E. A Yurok consultant said people fished in the creek at this place.

*Karok camp* at NW ¼, Section 28, T13N, R3E. According to a Yurok consultant, during the "treaty signing time" there was a "big war" (Red Cap War) in the Karok territory and many of the Karok ran to the mountains (also see Bledsoe 1956). The consultant's father said that some Karok people stayed at this locality for "awhile" and there were three or four house holes here.

There was an *Acorn camp* southeast of Stevens Prairie located southeast of the center of Section 6, T12N, R3E.

\* \* \* \* \*

From what has been previously said about the sacred places in the high country, it should be clear that part of the religious experience for doctors rests on the quality of the environment in which they are trained. One obvious intrusion on this type of private religious training is the destruction of silence in the high country which would occur if a road passes close by the sacred sites. One consultant said that he had not been able to achieve a trance at Doctor Rock (men's) because blasting was going on in the Flint and Elk Valley areas. Another consultant stated that some boys went into the high country around Red Mountain to shoot targets, and were told by an old Indian that the noise was not right. The boys ignored the warning and a storm came. The consultant told the boys that the storm should be a lesson to them. The consultant emphasized to the field researcher that you must not disturb the peacefulness of the high country and that a respect involves quiet.

Another element necessary to the Indian religious experience pertains to the purity and integrity of the land surrounding the practicing doctor. Scarred hills and mountains, and disturbed rocks destroy the purity of the sacred areas, and consultants repeatedly stressed the need of a training doctor to be undistracted by such disturbance. For example, one Yurok consultant personally recalled having heard Fannie Flounder, the last widely known sucking doctor, state that "in order to train properly, it is important that the land is to be undisturbed to the east [high country]." Specific to the disturbance potential of the G-O Road project is the following published assessment by a Karok consultant of the prospect of training new Karok curing doctors:

Now, today, we're looking into ways to do it right. We don't want to make any mistakes. There are some people with knowledge yet. We've still got the knowledge to show this younger generation.

The ability to make doctors will come back. The potential is still there yet. As long as there's some people and the knowledge to do it and the potential to do it. Right now there aren't any in our tribe, but the potential is there. They know that if they ask, they can become one. But they're scared, because those roads are going in there. And they know that once those things are disturbed, they won't fulfill what they want.

Doctoring has got to get picked back up again. If that G-O Road goes through, like they want to push it through, I think it's going to have a great effect on our doctoring. I think it's going to spoil it. At this time we're not thinking about doctoring until that road is stopped.

...

In Twenty-five years, we'll be quite effective again. We'll have Indian doctors again. That's if they don't disturb too much of the sacred ground . . .

[Thom 1978:150-151].

Consultants also spoke of their worry that unprepared people can wander into an area of power and be harmed. It is also obvious to consultants that easy access, *i.e.*, a road, would be an open invitation to tourists, collectors and other outsiders to come into the sacred areas. As far as the question of the visibility of Indian religion is concerned, by its very nature doctor medicine is a very private religious practice. Therefore, it should be apparent that the idea of a road opening up the sacred site would be diametrically opposed to the religious beliefs of the Indian people directly concerned with the project area. Local feeling on this subject is reflected in the words of a Karok man:



They're putting through the G-O (Gasquet-Orleans) Road, which conflicts with everything involved with getting medicine down into the Brush Dance hole. That road goes right past Chimney Rock, Doctor Rock, Little Medicine Mountain, Flint Valley. Those are places where we can shoot medicine right down . . . like radar [Thom 1978:149].

There are some Indians who feel no objection to the road going through the Doctor Road area. These Indians do not believe that the sacred sites are important. Some of those who do not object to a road have, however, suggested that the road follow a route that will not bring it too close to Doctor Rock and Chimney Rock and that a buffer zone be established around the sacred area. However, the opinions of most of the Indians interviewed supported the idea that no changes be made in the area from this time on.

One hundred and sixty-six people were interviewed during the fieldwork portion of this project. Eighty-four were men and eighty-two were women. Sixty-three were Yurok, forty-nine were Karok, ten were Hupa and twelve were Tolowa. Twenty-one were Karok-Yurok-Tolowa, eight were of various other tribal combinations from this area (e.g., Yurok-Karok-Tolowa-Hupa), and three were other local Indians from other tribes. Fourteen people (or 8.4%) were in favor of the road; 120 people (or 72.2%) were against the road; and thirty-two people (or 19.3%) had no opinion on the road.

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#### SUMMARY AND CONCLUSIONS OF THE ETHNOGRAPHIC COMPONENT

The ethnographic component of this report has demonstrated the existence of an on-going indigenous religious system, shared by contemporary Northwest California Indian people since before the time of Indian/non-Indian contact. This belief system has been shown to

incorporate elements of daily life, ritual practice, geographic locale, and ideas of origin and World Renewal into a conceptualization of sacredness. This concept is foreign in many ways to western European categories of thought. Further, it has been demonstrated that the Blue Creek high country (and the G-O Road project area within it) is significant as an integral and indispensable part of Indian religious conceptualization and practice. Specific sites within the project area are necessary to the training and ongoing religious experience of individuals using the area for personal medicine and growth, curing medicine, devilry, and medicine affecting the well being of local communities as well as (today) the broader world community. These sites are necessary both as specific sites for specific medicines and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power. Individuals progressively use sites of increasing power and this progression is a necessary part of religious growth. Experience at the lower levels of medicine is a prerequisite for attainment of power at the higher levels. Research has also shown that successful use of the high country is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.\*

Ethnographic research has shown that not all contemporary Indian people subscribe to the traditional religious belief system. However, the majority of non-followers interviewed in the ethnographic survey felt that the high country should be preserved as a sacred area. The overall findings of the ethnographic survey indicate that a large majority (72.2%) of all those interviewed were against the construction of the Chimney Rock Section of the G-O Road.

\* That such qualities are also held as valuable by present day environmentalists does not in any way detract from the authenticity and strength of traditional Indian belief systems (as some have suggested).



Based on the ethnographic findings summarized above, it is the conclusion of the ethnographic researchers that the construction of the Chimney Rock Section of the G-O Road, along any of its alternative routes (1-9) would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples. It is, therefore, the recommendation of the ethnographic researchers that the Chimney Rock Section of the G-O Road, along any of its alternate routes (1-9) not be constructed. A more comprehensive presentation of conclusions, together with specific impact analysis and mitigation recommendations, is presented in the final section of the report.

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#### HISTORICAL SUMMARY AND CONCLUSIONS

The history of Indian-White relations on the northcoast began in the late 1820's when White fur traders entered the Klamath River region in search of pelts. The first contacts described in the documents are generally characterized by friendly relations between fur traders and Indians, although some minor incidents did occur. In the fur trading period Indian people acquired trade goods and experience in commercial relationship with Whites.

The Gold Rush brought thousands of Whites into the Klamath River region. These newcomers were primarily interested in quick wealth and many viewed the Indians as an obstacle although others utilized Indian labor in their mining operations. Indian-White conflict over the use of traditional Indian territory occurred regularly and sometimes burst into open warfare. Many gold miners believed that Indian communities should be destroyed and their inhabitants killed when it was thought that an Indian had committed a crime against a White.

In 1851, the federal government sent representatives to the northcoast to negotiate a treaty. The treaty set aside a large reservation on the Trinity River in the vicinity of the present Hoopa Reservation. The United States Senate however, refused to ratify the treaty and Indian affairs were left essentially in the hands of local Whites. Many Whites in the Klamath River mining region wanted all Indians removed and set out to do so by force. The federal government attempted to protect both Indians and Whites with U.S. Army troops, but there were not enough army personnel to do the job properly. After the Klamath River reservation was established on traditional Yurok territory attempts were made to relocate many northwest California Indians within its boundaries.

During the late 1850's and 1860's Indian-White warfare became increasingly bitter and brutal. White volunteers sometimes killed Indian men, women and children, and the United States Army conducted campaigns against the various Klamath River Indian groups. There are no exact records of how many Indian people were killed during the wars, but accounts make clear that a substantial number were lost. In spite of this destruction, however, Indian people refused to leave the Klamath River region. Government attempts to remove Indian groups to reservations were not wholly successful since Indian people frequently fled from the reservations if they were not located in their own traditional territory. Records indicate that a regimen of labor for men, women and children coupled with corporal punishment also drove many Indians away from the reservation.

The archival records also show a history of Indian-White relationships in the economic sphere. Many Native American people found employment in the numerous activities associated with logging, mining, farming and the general economic development of the area. Employment in non-Native American industries provided many Indian people with the means to survive the extremely harsh con-

ditions especially those of the nineteenth century. Native Americans presently work in the lumber industry (see Part I, Ethnography) and other non-Indian enterprises in the Klamath River region. Indian-White inter-marriage has been another aspect of Indian-White relations.

Attempts to indoctrinate Indians into Christianity and to encourage them to give up their traditional religious practices met with mixed results. Some Indians accepted Christian religions but others did not. It is not possible to estimate the number of people who were converted to Christianity. The documentary evidence does show, however, that Indian people continued to practice their traditional religions while Christian missionaries attempted to convert them. Records show that Indian traditional religious observances continued well into the twentieth century. There is no documentary evidence to suggest that Indians stopped practicing their traditional religious ceremonies for any substantial period of time prior to the lifetime of Indian consultants now living.

With regard to the project area, archival research indicates that Native American religious use has been subject to several non-Native American impacts both direct and indirect, the precise nature and extent of which cannot be assessed from the archival record alone. The most important of these were mining activity, warfare and the partial destruction of the Native American community, the Federal reservation experience, and changes in land tenure from Native American usage to federal and private White ownership. Tenure changes have affected both non-religious use of the project area (especially with regard to hunting and gathering), and religious use (e.g. see Appendix C).

The history of Indian relations on the northcoast gives us several important insights into the present controversy over the construction of the G-O Road. Although most pertinent documents are concerned with other aspects of Indian life there are a few specific documentary references

to Indian use of the high country (see especially pages 173-175, 177-178, and Appendix C). It is also documented that many Indians continued to live in their traditional territory where they had access to the adjacent sacred areas. It is further documented that when the federal government attempted to remove Indian people from the Klamath River to reservations distant from their homeland, they almost invariably escaped and made their way back to the Klamath River where the geography provided daily associations with their traditional religious practices.

Historical documents indicate that Indian religious observances continued well into the 1920's, a time within the memories of Indian consultants now living (e.g. p. 177). Thus, the historical record supports statements by contemporary Indian people (Part I, Ethnography) and points to long established use of the high country for religious purposes of great significance to northwest California Indian cultures.

Considered together the archival and ethnographic records (see Part I) demonstrate that the high country has been in use for Native American religious purposes since before Indian-White contact and that such use has been continued in spite of circumstances which made it extremely difficult to maintain traditional religious and ethnogeographic associations. Because their religious practices are so closely associated with geographic features it is of paramount importance that the relevant geographic area be protected from developments which would adversely affect Native American life of the area.

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## SUMMARY AND RECOMMENDATIONS OF THE REPORT

### Summary

Theodoratus Cultural Research has been charged with the responsibility of conducting extensive and intensive ethnographic and archaeological research concerning Native American use of recognized cultural properties



within the Gasquet-Orleans Road, Chimney Rock Section project area. A comprehensive research design was submitted to the Forest Service by TCR pursuant to the concerns expressed in the agency's request (USDA-FS-RFP). The USFS required ethnographic and archaeological information of this type as the result of a conflict, which may be characterized as at times bitter and acrimonious, between anthropological researchers who have examined the project area. The debate between these anthropologists generated a number of important questions regarding the significance of specific cultural properties in the region under study. In the course of this debate it became clear that certain of these salient questions could only be addressed through a renewed field research effort. It is not the purpose of TCR to address the interpersonal hostilities of this long-standing debate. Rather we have attempted to address those questions and issues which have been generated by the debate and which are of critical importance to the proper management of the identified cultural resources.

The general questions which have been raised to date regarding the significance of the identified cultural properties within the project area may be summarized as follows:

- (1) What is the nature and extent of prehistoric, historic, and contemporary Native American uses of the sites and regions under consideration?
- (2) What is the nature and extent of concern in the generalized Native American community for the identified sites and regions?
- (3) To what extent is contemporary Native American use associated with "traditional" uses of the area and to what extent has contact and acculturation modified those traditional uses?
- (4) How would completion of the Chimney Rock section of the G-O Road impact any identified cultural properties within the region? And,

- (5) How is such impact, if any, related to those identified Native American uses or sentiments regarding the cultural properties under consideration?

These general questions have guided the field research and analysis undertaken by TCR. Based on these general considerations a number of specific field research questions were generated and these are discussed in the introduction to the ethnographic component of this report (p.10). Questions specific to the archaeological concerns are discussed in the archaeological component of this research effort which is presented as a unit in Section III of this report. Data, conclusions and recommendations specific to the archaeological features of the study area are to be found in that section of the report.

In the course of ethnographic historical, and archaeological fieldwork and analysis TCR has arrived at a number of conclusions regarding Native American uses of and involvement in the project area. These conclusions relate to the prehistoric, historic, and contemporary use of the area, the nature and frequency of such use, and the significance of the area to adjacent Native American communities. These general ethnographic and archaeological findings have been discussed in detail in the preceding sections and may be summarized as follows:

- (1) A major use by Native Americans of the project area may be characterized as sacred or religion-related activities. A number of sacred sites and locales have been identified through field research, some of which have been previously designated as "cultural properties." These have been discussed in detail in the ethnographic and archaeological sections of the report.
- (2) Field research and an examination of the existing ethnographic literature has demonstrated that the high country of the Blue Creek area (see p.1)



has been and continues to be characterized by the relevant Native American communities as a sacred region. It has been found that, while Native Americans may identify and describe specific sites or locales within this region, *the region itself* possesses characteristics which contribute significantly to the sanctity of that region's individual components (see Archaeology, Part III, pages 387-413 for specific archaeological conclusions on this subject).

- (3) Field research indicates that within the Blue Creek area high country there exists a hierarchy of sacred sites and locales. That is, various sites might be used to achieve doctoring abilities or personal power of various kinds and, importantly, degrees. This geographic hierarchy of power is correlated with the progress of the individual practitioner's quest for power. Thus, a seeker of power progresses through sites of increasing power and aspires to the use of the most powerful locales such as Doctor Rock, Chimney Rock, or ultimately, Peak 8.
- (4) The Blue Creek area high country has been found to be used, for sacred/ceremonial purposes, by individuals for the acquisition of doctoring (curative) power or for personal (strength, luck, spiritual, etc.) power. Specific locales may be generally correlated with specific power quests, although some sites have been found to serve multiple power quest purposes.
- (5) The high country of the Blue Creek area has been and continues to be used by members of the Karok, Yurok, and Tolowa groups. In addition, the area is recognized by the neighboring Hupa to be of sacred significance. The complexity of

affiliation between Northwest groups further strengthens religious use and ties.

- (6) Field data documents that individuals aspiring to the use of sacred sites within the Blue Creek area must undergo rigorous training and preparation prior to entering the high country.
- (7) Significant procedures and practices associated with the use of the Blue Creek area have been shown to occur both historically and in the present within the home community of the individual practitioner. Home communities form a recognized "support group" which aids the individual during preparation and training. The community, in turn, derives, spiritual benefit from the success of the individual's power quest.
- (8) Field research verifies that the Blue Creek high country is currently in use for both medicine making and doctor training. Among the users at least six individuals from the Yurok and Karok groups, all of whom are under thirty years of age, are presently engaged in the rigorous "ten day" preparatory rituals and in the use of specific sites within the project area.
- (9) During the course of ethnographic field research a large majority of those interviewed expressed concern about existing or potential desecration of the entirety of the Blue Creek area sacred region. Of this sample, a large majority expressed the feeling that the completion of the G-O Road, in any of its alternative forms (Routes 1-9) would desecrate the region. Numerous opinions elicited specified that completion of the project would create both *indirect* as well as *direct* negative impacts upon this sacred region. The Forest Service has in their Eureka office an additional body of data which

further demonstrates Native American concern over the building of the G-O Road (see USDA-SRNF Eight Mile Blue Creek Cultural Resource Contacts and Information). This finding is significantly related to Native American perceptions of the Blue Creek high country as an ecologically and spiritually *interrelated* region, which in its entirety affects the quality of the vision quest of an individual, and the spiritual life of the community. (See Part III, Archaeology, pages \_\_\_\_ for archaeological findings which also indicate that the significance of the area lies in the integrity of the region as a whole.)

- (10) Archaeological field research has found the cultural properties in the Blue Creek area to reflect a dimension in the prehistory of Northwest California for which no other archaeological data is known to exist. The archaeology of the area is unique in establishing the antiquity of Indian peoples in the region, the relationship between coast and highland prehistory, and the changing role of the highland in the development of the distinctive Northwest California cultural tradition.

#### General Project Impacts

The proposed completion of the Gasquet-Orleans Road creates a number of potential direct and indirect impacts to the extant cultural resources of the region. These impacts are the product of the relationship of the geographic and design features of the proposed road and of the nature or the cultural resources under consideration. The completion of the road itself will generate direct impacts to identified resources, however, it is those activities which potentially follow from the completion of the road which must be considered as having the greatest potential impact to

the identified cultural resources. These activities include the following land management alternatives.

#### Logging Activities

The completion of the Chimney Rock Section as specified in the DES, will create the potential for vastly increased logging activities in the areas adjacent to or served by all portions of the G-O Road. In addition, the road will be used from the outset by logging operations seeking a shortcut for the transport of timber. Based upon our field research, the following aspects of these potential logging activities may be viewed as impacts on the cultural properties under consideration:

1. physical destruction through the removal of trees, the construction of secondary roads and skid trails, the presence of slash, erosion, and other features of logging operations.
2. reduced visual quality resulting from potential environmental changes described in number one above.
3. increased noise levels resulting from trucks, heavy equipment, blasting, saws, and whistles.

#### Recreational Use

The completion of the Chimney-Rock Section will create the potential for managed and/or unmanaged recreational use of the study area. Specific impact-creating situations will include:

1. increased authorized and/or unauthorized visitor use of the Blue Creek high country with increased pressure on existing trail systems by recreational hikers and a general increase in the density of persons within the study area.
2. general environmental degradation due to littering and the creation of unauthorized campsites and/or picnic areas.

3. increased danger of catastrophic destruction due to visitor-caused fires.
4. increased potential for generalized environmental degradation stemming from the unauthorized use of two or four-wheel off-road vehicles, with severe impact specifically upon existing trails, floral and faunal resources, and identified sacred high point locales.
5. degradation of the visual and aural qualities resulting from the use of such off-road recreational vehicles.
6. increased danger of vandalism (pot hunting and or random destruction) of specific cultural properties.

#### Mining and Related Activities

The completion of the Chimney-Rock Section will create the potential for the exploitation of non-timber resources within the study area. Specifically the potential exists for mineral explorations and mining activities. Specific impact-creating situations will include:

1. physical destruction through clearing and removing of trees, construction of secondary roads, tunnels and buildings, removal of mineral ore, presence of tailings and/or other mining debris.
2. reduced visual quality resulting from potential environmental changes described in number one above.
3. increased noise levels resulting from blasting, trucks, heavy equipment, mining machinery.

Through the consideration of the relationship between the above cited activities and the qualities and characteristics of the identified cultural properties—TCR has derived the following analysis of potential impact.

#### Impact Identification and Mitigation Recommendations

- (1) *Impact:* The high country of the Blue Creek area (within which the project area is located) has been determined to be sacred to three Native American cultural groups. The complexity of inter-group affiliations make it also an area of concern for some members of a fourth group. Further, it has been found that although specific religious sites are identified within this region, the entirety of the region possesses a generalized sanctity which is necessary for the proper use of the specific sacred sites. It has additionally been found that pristine visual and aural conditions are salient attributes of the medicine quests undertaken in this sacred area. The construction of the Chimney Rock section of the G-O Road *on any of the proposed routes (Routes 1-9)* will create a direct impact upon this sacred region. Field data indicate that increased intrusion into this sacred region would adversely affect the ability and/or success of the individual's quest for spiritual power. Field data also clearly indicate that existing intrusions into the area have already caused such impairments. The research has shown that the spritual, moral and physical viability of the practitioner's home community will be diminished in proportion to the diminished ability of that practitioner to seek and attain power within the high country. Research also has demonstrated that the Indian concept of World Renewal is inextricably related to religious practice in the high country. Intrusions on the sanctity of the Blue Creek high country are therefore potentially destructive of the very core of Northwest religious beliefs and practices.



Recommendation: It is TCR's general recommendation that the spiritual nature of the region involved and the demonstrated importance of that region to the concerned Native American individuals and communities prohibit the construction of Chimney Rock section of the G-O Road *and any of its alternative forms* (Routes 1-9). The nature of Northwest Indian perceptions of the high country and the requirements of their specific religious beliefs and practices associated with the high country make mitigation of the impact of construction of any of the proposed routes (1-9) impossible. An alternate to this recommendation is that the G-O Road be connected by a route significantly distant from any portion of the sacred Blue Creek high country.

- (2) *Impact:* It has been determined through research with field consultants that the sanctity of the Blue Creek area is a product of its homogeneity and would be demeaned and desecrated by any environmental degradation of the area. Such degradation is considered by consultants to include such factors as logging, mining, stream pollution, recreational use, and increased visitor access. Such intrusions are considered by the local Native American communities to be detrimental to individual power quests and thus detrimental to the well-being of the communities themselves.

Recommendation: It is recommended that the Blue Creek area remain, in its entirety, a pristine area, protected from the incursions of logging, recreational use, and visitor access, regardless of the ultimate location of the proposed intervening section of the G-O Road. The nature of North-

west Indian perceptions of the high country and the requirements of their specific religious beliefs and practices associated with the high country make mitigation of the impact of construction of any of the proposed routes (1-9) impossible.

#### Additional Recommendations

In addition to the recommendations discussed above TCR also offers the following recommendations specific to special situations which the research brought to light:

1. It is recommended that the implications of Public Law 95-341, enacted August 11, 1978, and commonly called "The American Indian Religious Freedom Law," be taken into account in any future decisions regarding land management alternatives affecting the high country of the Blue Creek area. This law ensures the rights of American Indians to practice their traditional religions, "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites" (U.S. Congress P.L. 95-341, August 11, 1978). The law affirms that traditional Indian religions are indispensable and irreplaceable as integral parts of Indian identity, value systems, and lifeways and provides for Federal departments and agencies to evaluate their policies and procedures in order to ensure that Native American religious and cultural rights and practices will be protected and preserved (U.S. Congress P.L. 95-341, August 11, 1978). Northwest Indian people are aware of this legislation and of its relevance to the proposed G-O Road project and feel that the law establishes a legal basis for their claim that the sacred Blue Creek area high country should be preserved and protected.

2. It is recommended that in order to alleviate future land management problems, the Forest Service conduct an

overview of important cultural properties in the Six Rivers National Forest. This recommendation is based on certain specific findings of this study and on awareness of the socio-political situation which necessitated this TCR research. In the fieldwork and analysis for this report, researchers were constantly made aware that the G-O Road project area, as well as the larger Blue Creek high country are related to the broader area of Northwest Indian religious concern with highlands and mountains. Other regions/sites of religious significance to Northwest Indian people lie within the Six Rivers National Forest, but outside the boundaries which set the limits for this study. For example, Rattlesnake Ridge/Mountains are reported to be possible sacred areas, the nature and significance of which may be equivalent to the sites reported in this research. If this is so, this area presents a potential dilemma for future land management decisions by forest service personnel. An ethnographic and archaeological overview would identify specific areas of cultural significance and provide valuable information which would be available prior to any initial decision making process. Both ethnographic and archaeological research are critical to an overview aimed at discovery of contemporary as well as prehistoric cultural values and properties.

In view of the present renaissance and more open acknowledgement of Indian culture and religion, the Forest Service may anticipate a strong stand on the part of Indian peoples in favor of preservation and protection of their traditional sacred lands. An overview study would enable the Forest Service to be more fully advised on the nature and extent of Native American cultural resources within Forest Service jurisdiction, and help Forest Service personnel to take the needs of this important segment of American society into account in making land management decisions.

3. Theodoratus Cultural Research recommends that the Blue Creek high country be considered a district and nominated to the National Register of Historic Places, based on its historic and prehistoric attributes. Further, we recommend that the nomination be forwarded as a joint effort of the United States Forest Service and Theodoratus Cultural Research. This report has suggested specific sites as well as general locales which should be considered within this potential district. These recommendations should be considered in nomination proceedings. It is the opinion of TCR that the combined expertise of TCR research staff and knowledgeable, experienced United States Forest Service personnel will generate a comprehensive and responsive National Register nomination.

#### General Recommendation

It is the general assessment of Theodoratus Cultural Research that the completion of the G-O Road *via any of the proposed Chimney Rock alternatives (Routes 1-9)* will produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities. Such impact will be created through the degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities. It is recommended, therefore, that such an impact is, in fact, sufficient to justify the rejection of all proposed routes (Routes 1-9) of the Chimney Rock section of the G-O Road. In addition, it is the general recommendation of Theodoratus Cultural Research that the Blue Creek area remain environmentally pristine in every respect, to insure appropriate access and use by Native American practitioners. It is only by such actions that the beliefs and practices of these Native American cultures can be protected and granted the freedom of expression necessary for their survival.\*

\* This recommendation is in the spirit of Public Law 95-341, enacted in August, 1978, entitled "The American Indian Religious Freedom" Law.



**DEFENDANTS' EXHIBIT F ("Review Of Cultural Resources Of  
The Chimney Rock Section, Gasquet-Orleans Road,  
Six Rivers National Forest")**

**VI. SUMMARY AND COMMENTS**

**1. Summary**

The TCR Report has confirmed that the upper Blue Creek study area is a highly significant region with important prehistoric, historic and current cultural values. The most significant aspect of this region is its religious value to the Yurok, Karok, Tolowa and to some degree the Hupa Indians. Because this sacred "High Country" is the abode of the "Beforetime People" (*woge*), "Thunders," and other supernatural forces, certain Indians make pilgrimages to isolated peaks, ponds, and rock outcrops where they seek visions and divine guidance. Doctor training, personal medicine-making, and other forms of High and Low Medicine-Making are the main ways in which humans beings, supernatural forces, and natural features of the environment interact in the vision quests. These quests and the ritual activities associated with them are at the core of northwest California Indian religion.

The TCR study has confirmed the earlier claims by Indians and non-Indians that the construction of any of the nine alternative routes of the Chimney Rock section of the Gasquet-Orleans Road would result in adverse effect to the sacred "High Country" and the sites within it. It has also demonstrated that timber harvesting, mining and other intrusions into the upper Blue Creek area would have similar effects. These impacts include the physical destruction of significant archeological sites and ritual locations and the desecration of a sacred land, which in turn would destroy the value of the areas as a doctor training and medicine-making location, thereby severely damaging the local Indian culture.

The TCR Report has also confirmed that there is no way to mitigate this damage, short of cancelling plans for constructing the road, and then leaving the area undeveloped.

The TCR study and the archeological/ethnographic/archival research it is based on satisfy the specifications for contract #53-91S8-8-6045. The field techniques, sampling designs, data analyses and report preparation are well done and of high methodological/theoretical quality. Flaws include a weak and incomplete historic section; errors in the Ethnographic Map; and faulty interpretations, inadequate references and other errors in the archeological analysis and presentation. More attention might also have been given in the ethnographic section to distinctions between "High Medicine" and "Low Medicine," and to cross-cultural and functional variations in *tsektseks*. None of these deficiencies affect the conclusions of the report, however, nor do they weaken this otherwise sound and professional analysis.

**2. Comments**

Although it has clearly been demonstrated that the upper Blue Creek area is a significant locality which will be adversely affected if developed, it is likely that the controversy over the proposed construction of the G-O Road will continue for many years to come. This situation represents a classic cultural conflict between the human values and religious rights of American Indians and the economic and political forces within the broader American society. As shown by the events of the past six years this conflict has \* \* \*.

\* \* \* \* \*

it is a continuation of the century old confrontation between Indian and non-Indian cultures in northwest California. It is an expansion of the 130 years of resource competition which has pitted Indians against non-Indians.



This confrontation no longer involves acts of violence, as in the days of the Gold Rush and the invasion of the Anglo Americans, but it still has extremely serious consequences for the Indian inhabitants. In fact, in some ways it is more serious than the earlier warfare, since it threatens the core of their religious system. Even though the land involved is controlled by the Federal Government, many Indians still consider it as sacred ground which is inhabited by supernatural forces and thus cannot be owned, sold, exploited or otherwise treated as a "commodity" (cf. Buckley 1978). It is the heart of their religion. It is an area where their shamans are trained with divine assistance and where they make medicine. Road construction, logging, mining and other disruptive intrusions are totally incompatible with the ritual uses of this sacred country.

The conflict over the "High Country" therefore goes far beyond the issue of whether or not the road should be built and the area developed. It also goes beyond the question of whether or not the religious rights of a minority group are being denied. It involves a cultural conflict over the meaning of the area, with one culture's perception that it is a holy land challenged by another culture's belief that it is merely a valuable source of timber, copper, and other economically necessary resources. By denying that it is a fragile, significant area with religious values, the non-Indian culture is actually stating that the Indians' religion is of no value. Most Indians \* \* \*.

**Defendants' Exhibit HH-4**

**Advisory Council On  
Historic Preservation**

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1522 K Street, NW  
Washington, DC 20005

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Jan. 29, 1982

Honorable John Block  
Secretary of Agriculture  
Washington, DC 20250

Dear Mr. Secretary:

I am writing to you regarding the Council's review of the Gasquet-Orleans (G-O) Road in the Six Rivers National Forest and recommendations arising from that review. However, before addressing that subject I wish to let you know that I very much look forward to our meeting now scheduled for March 5. I welcome an opportunity to express personally and in some detail my appreciation for the exceptional assistance your office is providing the Council through the participation of your representative, Dr. Janet Friedman. Dr. Friedman has been especially helpful as we have been recently striving to revise the regulations which govern the Council's commenting on Federal undertakings.

With regard to the G-O Road, on December 28, 1981, the Council's Executive Director declared a failure to agree in our consultation with the Six Rivers National Forest regarding the effects of the proposed Chimney Rock Section of the G-O Road on the Helkau Historic District, a property determined eligible for the National Register of Historic Places. In accordance with our regulations, the

Executive Director referred the case to me to decide whether it should be heard by the members of the Council. I determined that it should not be heard, but that on behalf of the Council I should provide recommendations to the Forest Service, as the regulations prescribed at 36 CFR Sec. 800.6(d)(1).

Enclosed are the recommendations. The problem highlighted in this project is the product of segmented planning and results from decisions that were made or assumptions that existed prior to the establishment of the legislation, regulations, and planning processes that help protect historic properties today. We have been assured that the case in point is an isolated one which does not reflect on the current planning processes of the Department as a whole.

We want to be certain, however, that the appropriate authorities understand the problems that segmented planning cause, and we do feel strongly that it is fundamentally wrong to so seriously impact an area held sacred by a group of American citizens, if any feasible alternative exists.

As a final recommendation and as an offer of assistance, I would suggest that the Chief of the Forest Service and the Council's Executive Director jointly review the Forest Service's planning system to ensure that we work cooperatively together on problems of this kind and that we are not faced with a recurrence of this situation.

Sincerely,

/s/ ALEXANDER ALDRICH

Alexander Aldrich  
Chairman

Enclosure

**RECOMMENDATIONS**  
of the  
**Advisory Council on Historic Preservation**  
on the  
**Gasquet-Orleans Road**  
**Six Rivers National Forest**

Pursuant to Section 106 of the National Historic Preservation Act and Section 800.6(d)(1) of the Council's regulations, the following are the recommendations of the Advisory Council on Historic Preservation on construction of the Chimney Rock Section of the Gasquet-Orleans (G-O) Road.

The G-O Road is the product of poor planning, which has effectively foreclosed the Council's opportunity to comment fruitfully and the Forest Service's opportunity to avoid irresolvable conflicts between competing public needs. Clearly, the need for a road linking the sawmills on the California coast with the timber-rich interior is a real one, if not during the present period of economic recession, then at least in the future when the economy regains strength.

Just as clearly, the needs of the Yurok, Karok, and Tolowa people are real. These people are today undergoing a cultural revitalization in which the resurgence of traditional religious practices plays a vital role. In a nation of many cultures, which treasures the rights of individuals to believe and worship as they choose, the revitalization of Native American cultures must be encouraged and sustained, and the places where people worship should not be violated.

It would clearly be wisest to build the needed road along a route that did not take it through the Helkau Historic District, whose pivotal cultural importance to the Yurok, Karok, and Tolowa has been thoroughly documented by the Forest Service's excellent ethnographic studies.



However, to build the road along some other route would require abandonment not only of the Chimney Rock Section, but also of at least the Salal, Dillon-Flint, and Summit Valley Sections of the G-O Road, all of which have been fully constructed.

Construction of the Salal and Summit Valley Sections took place without compliance with Section 106 of the National Historic Preservation Act, although the Act was fully in force several years before construction occurred. Construction occurred on the Dillon-Flint Section after the Forest Service determined that the construction would have "no effect" on historic properties, but this determination was made before the ethnographic studies were made that defined the Helkau District, and it is now clear that the determination was in error.

By advancing the G-O Road to points within the Helkau District on both sides, construction of the Dillon-Flint Section together with the earlier construction of the Salal and Summit Valley Sections brought the Forest Service to a point at which it has no choice but to proceed through the District or abandon almost 16 miles of fully constructed road. By planning, considering the effects of, and constructing the G-O Road in segments without fully considering the impact of the whole, the Forest Service has brought itself to an impasse, and any comment the Council could make would be essentially gratuitous.

On several occasions the National Forest has defended its approach by noting that the concerned Indian people and other members of the public failed to object to its decisions not to prepare Environmental Impact Statements on the earlier-constructed segments of the G-O Road. This justification with regard to the requirements of the National Environmental Policy Act is not relevant to the responsibilities imposed by the National Historic Preservation Act. It is the responsibility of each Federal agency

to take into account the effects of its undertakings on historic properties, and to afford the Council a reasonable opportunity to comment, not to comply with the law when called upon to do so by some vigilant member of the public.

While the need for the G-O Road, or some similar road linking the coast with the interior in a way that makes the forest resources of the latter available to the mills of the former, is recognized, the Council cannot sanction a project whose planning has been so badly segmented as to hardly constitute planning at all, and which will as a result have devastating effects on a historic property of great cultural value to the native peoples of the area. Accordingly, the Council recommends that:

1. the Chimney Rock Section of the G-O Road not be constructed;
2. at least the Dillon-Flint and Summit Valley Sections of the G-O Road be closed except to Forest Service administrative traffic;
3. Native American access to the area for religious and other cultural purposes be protected, in consultation with the Native American groups involved;
4. the Forest Service proceed with all diligence to explore alternative routes for a road from the coast to the interior; and
5. the Forest Service plan any such road thoroughly, with full consideration of its impacts before construction is permitted on any segment.



**Defendants' Exhibit E (Draft Environmental Impact Statement,  
Gasquet-Orleans Road, Chimney Rock Section)**

Sound intensity is measured in decibels (dB), and is expressed on a logarithmic scale. The faint rustling of grass or of leaves in the trees or a weak whisper produces a sound level of 20 dB at close distance; an automobile produces sound levels of about 60 to 70 dB at a distance of about 50 to 100 feet. A diesel truck might produce sound levels of 90 to 100 dB while traversing a roadway.

Sound level meters are usually equipped with "weighting circuits" that tend to represent the frequency characteristics of the average human ear for various sound intensities. In this report, sound intensities represent sound levels in decibels measured on the "A" scale and are reported as dBA.

An important design criterion is 60 dBA for "tracts of land in which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose" (U.S. Department of Transportation, Federal Highway Administration Policy and Procedure Memorandum 90-2).

Audiologists recognize a difference between sound and noise. Roughly speaking, "sound" is a neutral term, while "noise" is perceived in a negative context. In a dispersed recreation area, therefore, the noise emitted from a nearby chainsaw or logging truck which exceeds the detection level for a significant period of time may be perceived as unacceptable. The sound of children playing and pots rattling may be perceived as neutral to positive but may become noise if perceived while the recreationist is trying to rest.

Table 25 defines the expected noise levels from a single logging truck located at the closest point in each road segment as perceived in the proposed campground in Elk Valley. The calculations utilize Table 1.3 in U.S. Depart-

ment of Transportation Report No. FHWA-HHI-HEV-73-7976-1, "Fundamentals and Abatement of Highway Traffic Noise," 1973, to define reduction of A-side sound level (dBA) at various distances from a vehicular point source to 3,140 feet. Sound attenuation by woods, vegetation and other barriers was estimated according to the discussion in Parts 1.12 and 1.13 of the FHWA reference; the estimates were influenced by information available in Research Bulletin 246 (Cook and Haverbeke, "Trees and Shrubs for Noise Abatement," 1971).

**TABLE 25**

*Calculation of Noise Levels From a Single Logging Truck Located at the Nearest Point on Each Road Segment as Heard at the Center of the Proposed Campground in Elk Valley.*

Route Segment	Truck Output (dBA)	Distance (Feet)	Decrease w/Distance (dBA)	Sound Attenuation	Noise Level (dBA)
1	92	200	- 12	- 5	75
2	92	800	- 24	- 10	58
8	92	1450	- 29.8	- 10	52.2
9	92	3300	- 40.3	- 10	41.7
5	92	2650	- 37.3	- 10	44.7
6	92	2650	- 37.3	- 10	44.7
4	92	800	- 24	- 10	58

\* \* \* \* \*

2. The precise dates for the dances were fixed by the High Men of the "dance district" (Thompson 1916:43), and it was these men who oversaw the required settlement of all disputes and grudges prior to the dances (Pilling 1969:10).
3. The formulists, or priests, for these ceremonials are today referred to, in English, as "medicine men" by native informants, "medicine" being used in a manner invariably linked with mountain practice. Again,

"Doctor" is a common appellation of these formulators (e.g., "Doctor Joe"), "Doctor", as in "Indian doctor" (kegey), again carrying the connotation of mountain practice.

4. All of the major dances and rituals contained, at critical moments, reference to the inland mountains: the assistant in the First Salmon Ceremony at Welkwāu took an important visual cue from Red Mountain (Spott & Kroeber 1942:173); at Weitspus the Deerskin Dance climaxed high in the mountains (Kroeber & Gifford 1949); the Karok renewal at Ina'm incorporated a sacred mountain in the design and building of a ritual "seat" (*ibid*), etc.

(For additional, detailed information concerning the inter-relationships between High Men, their High Country training, and life in the lowland villages, see Buckley 1975.)

#### IV. Significant Attributes of the High Country:

What qualities determined, and perhaps still determine, the overwhelming importance of this district for indigenous populations? We may answer this question under several separate headings:

##### A. Solitude and privacy:

People would go up alone, in secret. And they'd keep themselves hidden if anybody came around. They didn't want to be seen. They'd camp off in the brush, and they'd just make a small fire so nobody could see them. That was because they were so pure, and they didn't want anybody to come near them and spoil it. They kept unclean people away.

The emphasis on extreme privacy in making medicine in the High Country suggests that the very remoteness of the district was one characteristic which suited it to use as a

spiritual precinct. Such privacy was demanded not only to protect the practitioner from interference, but to protect the innocent intruder from ritual contamination as well (cf., Waterman & Kroeber 1938). For this reason, men going to a "prayer place" marked the access trail with a freshly cut manzanita bough, and use of that place by others was prohibited until the leaves had wilted.

Solitude was sought not purely out of a need for such privacy, it was an essential constituent of the sort of meditative practice undertaken in the High Country, such solitude being conducive of extreme concentration and of "doing your thinking." Indigenous mystics went to this area in part for the same reason that Christian contemplatives seek out deserts and other wastes: to be alone with themselves and, ultimately, with God.

Finally, it should be added that for a people who depended entirely on communality and shared responsibility for their very survival—as all pre-industrial peoples must—such solitude comprised, in itself, a form of ordeal or test, parallel to those of fasting and self mortification. As we have seen, not all exercises undertaken in the High Country demanded complete personal privacy—the doctor's dance and the convocations of High Men have been mentioned. Nevertheless, the remoteness and solitude offered by the area were still a factor:

Our people go to those places because the forces are there. There's forces here too [i.e., Reqa], but its sort of unclean because people from every walk of life tread on here without respect. But when you go up into those mountains you walk in respect. You don't believe in destroying. You come there in peace, and that's what you'll find.

Again:

In the old days, not everyone went up there. Just people who had a right to be there. Nowadays anyone can go, just to have a good time, take a walk. And they mess it up. In the old days they couldn't do that.



### B. Visual and aural aspects:

The remoteness and untrammelled natural aspect of the district which insured the possibility of achieving solitude there also insured the possibility of communing directly and without interference with nature in its most pristine state. This was of great importance, since both the visible and audible constituents of the natural world, often in extremely subtle manifestations, were an integral component of the medicine making process: "To make High Medicine you have to be completely aware. Because if you're not, a lot of very important things will just pass you by, and you'll never pick them up."

These "very important things" were, largely, transmitted through the objects of sight and hearing. A long, unbroken eastern view was sought in making High (male) Medicine—the seats for such practice being oriented towards the east so that the practitioner could watch the sunrise, at which point, in culminating his exercises, he entered into trance. However, this long, unbroken view had other purposes. The preliminary training in preparing for making such medicine concentrated on the development of visual perception, which, in turn, was held to be conducive of mental perception as well:

To see means to see what is actually there, what exists; not what you want to be there, but what is really there in the world in front of you or in your own mind. Its all seeing.

Training in seeing utilized the natural world, students being urged by their mentors to achieve absolute concentration and precision:

He told me to look at the mountains over there, and to see them as a mass. And then to see every tree in its place. And if there was anything living there, leave it in. Leave everything just where it is. And then he said to close my eyes until I could see it all perfectly. Then I opened my eyes again. And he said 'there, now it's yours, you can take it with you.'

It was held that one could, having completely mastered such open and precise seeing, contact the "spirits" (Yurok, *wa•gay*) through visual perception: "*o wa•gay os*, its something way out there. Yes, we sight away out in the hills where there's nothing around. Just *wa•gay*, spirit." This sort of mystical perception was utilized in mountain exercises, practitioners striving to receive answers to their prayerful questions from trees, rocks, and more distant clouds and ranges (cf., Kroeber & Gifford 1949:66 *et. seq.*).

As visual aspects of perception were of great importance in making medicine, so too were aural aspects:

The men go there and sit in the seat there then after awhile they clap their hands, and if the echo comes back clear, they know they have what they've prayed for, but if it isn't clear, they know they won't have that good luck.

(This was a special sort of clapping, done with the skin of the palms stretched tight, producing a sharp popping sound. It was the precise reproduction of that sound which was sought in the echo.)

There's two places up by Doctor Rock. You could hear dogs, somebody breaking wood—can't see him. You hear dogs chasing deer—its sounds real, but there isn't anything there. Its deep [i.e., the subject].

The perception of such phantasmic sounds was considered an indicator of one's spiritual progress, and such perceptions provided essential clues to the answers to one's prayers. Thus, doctors listened at Doctor Rock for the sound of people talking on the river bar at Johnson's, and for the sound of ocean surf, these perceptions being, probably, an index of advancement.

Such 'hearing' was of special importance in the learning of personal medicine songs, one mark of successful practice. These songs were "heard," as though being sung by the natural forces: "So I was crying and crying, and once a



breeze came on the hill, and a song came to me. It was just like somebody was singing it to me" (Mayme Keparisis, a Yurok-Tolowa woman, in Raphael 1976:114).

Learning such "heard" songs takes great concentration and attention:

When you hear it, you stay until you get it. First you catch the tune, then you keep that, then finally you'll catch the words. They're hard to keep. These are ["Spirit Language"] words. They're emotional sounds, not really words.

The importance of such aural aspects of medicine making are cogently summarized by the Yurok word *so•ney?*. This word was translated by Robins in his "Yurok Lexicon" as "medicine, to make" (1958:286). A Yurok informant's explanation of this word is, however, interesting in the context of the present consideration of hearing:

*so•ney?* . . . its sort of a sound, a direction. You can make it anything you want; the wind in the trees, echoes. You hear a distant sound of singing—something not close to you . . .

Then, we'd say '*so•nautch*', ("it sounds like. . ."). The wind sounds different, blowing through different rocks. It's the sounds of natural things, the sounds in things.

When I'd go on the river . . . I'd close my eyes, and I'd hear the [imaginary] people laughing and talking in their boats. It just sounds real. Now, the motor boats—you can't hear a thing. They've cut down all the trees where the echoes used to be.

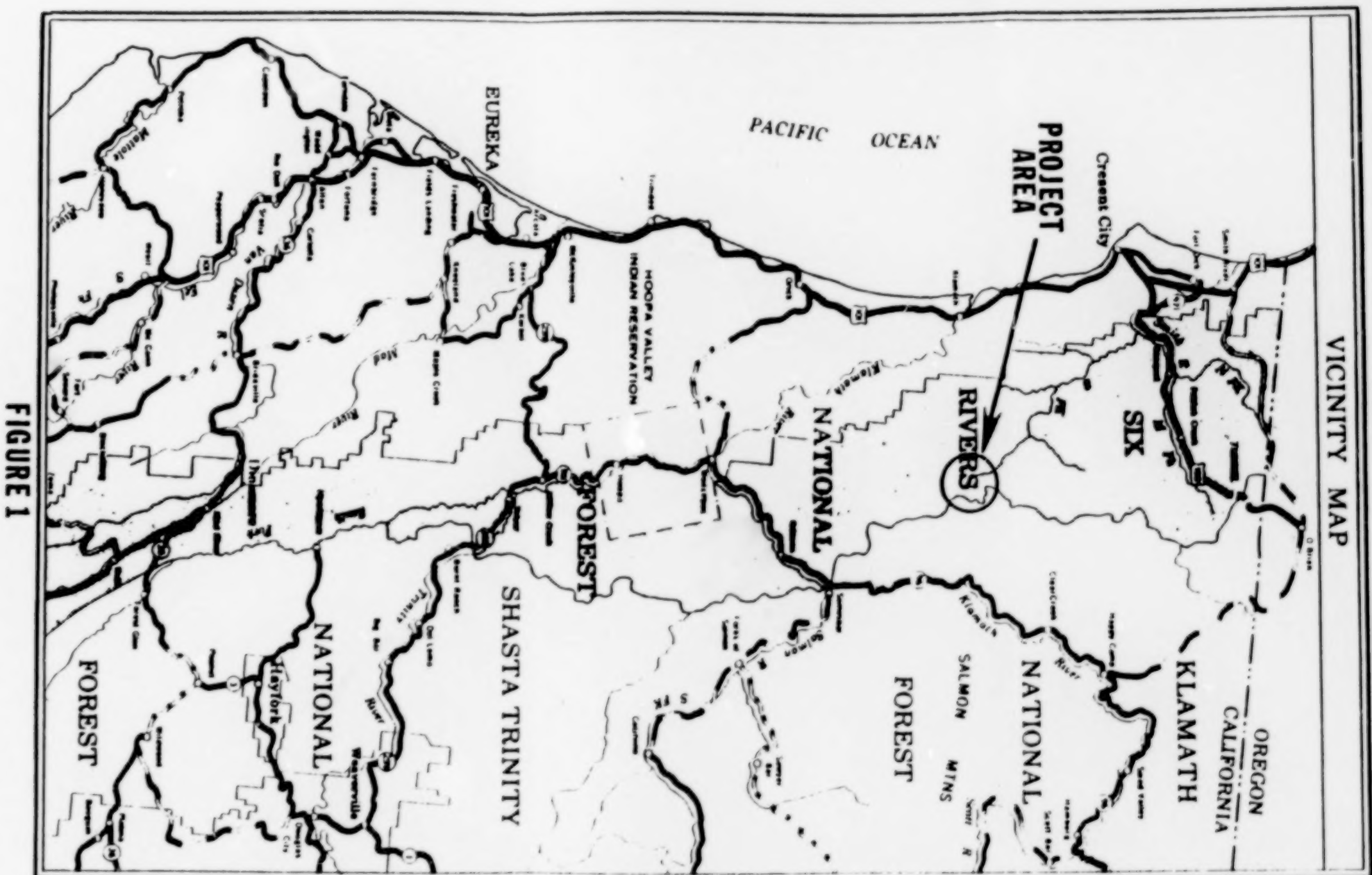
We will note, in the above quotations and discussion, the recurrent theme of *distance*; that is, in the visual and aural aspects of medicine making, distance was a constant factor. Unobstructed lines-of-sight over vast stretches of countryside, distant echoes and reverberations, the intuitive reenforcement offered by far off mountains and

clouds, were all of importance. Indeed, the word *wa•gay*—"spirit"—has, as we have seen, this very connotation as does *so•ne?*—"to make medicine."

### C. Mythological aspects:

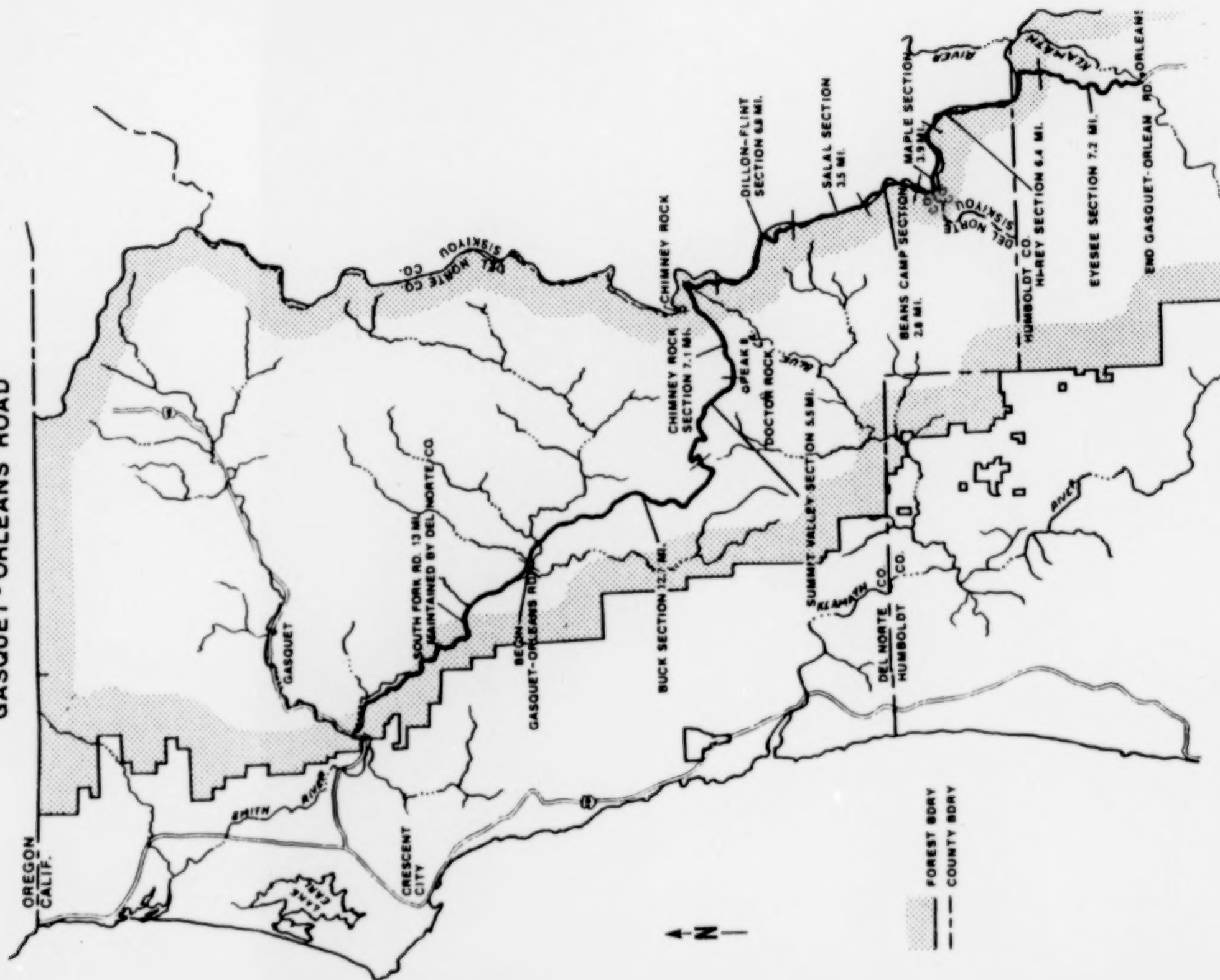
In cataloging the aspects of the High Country which, cumulatively, accounted for its particular significance to indigenous populations, the mythical importance of the area most certainly be included. Many myths and other narratives either took place in this setting or used esoteric practice there as a central motif (e.g., Kroeber 1976; Spott & Kroeber 1942, etc.). Among the most significant of these elements of oral literature are those detailing the departure of the *wa•gay* "Beforetime People" from the lowland areas. Many of these spiritual beings went to reside in the High Country as *helkäu-ni'wo*, lending their power to those who went there to practice (Spott & Kroeber 1942:246). Other of the Beforetime People ascended from earth, through the sky-bowl aperture, making their final departure from the serpentine ridge separating Elk and Flint Valleys (Buckley, Fieldnotes 1971). Again, the souls of great doctors were held by some to reside in the High Country, also helping the living to make medicine there (Elmendorf 1960:518n).

**Defendants' Exhibit G (Final Environmental Impact Statement,  
Gasquet – Orleans Road (Chimney Rock Section))**





**FIGURE 2**  
**GASQUET - ORLEANS ROAD**



\* \* \* \* \*

Construction/reconstruction activities of the G-O Road Sections to the planned two-lane standard were initiated in 1966. By 1971 the new road was completed except for the Chimney Rock, Dillon-Flint, and Eyesee Sections (see Figure 2). The Dillon-Flint and part of the Eyesee Sections were reconstructed a few years later; by the end of 1976, about 49 miles of the G-O Road had been built/rebuilt to the planned standard.

The alternative road locations selected for study within the Chimney Rock Corridor are all less than 10 miles long and would cost approximately two to three million dollars. Two alternative corridors were also proposed by some members of the Forest Service working group for reconsideration as options to the Chimney Rock Corridor. These corridors would partially provide the benefits that the proposed project would.

*Highway 101 Outlet to Klamath Glen.* This route is a 40-mile road (Route E, Fig. 4) to provide a connection to Highway 101 from the Dillon Camp area. The route leaves the existing G-O Road at Road Junction 13N01, thence along 13N01 to 12N03 to Blue Creek Mountain, thence along 13N02 (a private road owned by Simpson Timber Co.) to Klamath Glen. Using this route would require extensive reconstruction of the 20 miles outside the Forest boundary. It has approximately 10,000 feet of potential land stability problems along the existing road to the western Forest boundary in addition to 14 known potential slides on the private 20 mile portion toward Klamath Glen. The private land portion is adjacent to Blue Creek for much of its length and would require extensive yearly maintenance work in the unstable areas if reconstructed. This 20 mile portion of the road would not meet the 25 MPH design speed; it has segments with 19 percent grade, four curves having 40-foot radii, and 16 curves having less than 100-foot radii. Acquiring rights-of-way for the private portions of the road would take from 5 to 10 years and require condemnation.

*Southern Loop.* This route, from the Dillon-Flint Section to the Summit Valley Section by way of Blue Creek Mountain and South Red Mountain (Route E and F, Fig. 4), is the same as the Highway 101 Outlet as far as the Blue Creek crossing on 13N02. It then heads north to Stevens Prairie and South Red Mountain and connects to the G-O Road via 14N01. This 40-mile loop would allow travel to go either to Del Norte or Humboldt Counties, but would be a high-elevation route crossing serpentine barrens near various high peaks. It would require the acquisition of seven miles of private road (13N02) and would traverse approximately 18,000 feet of ground having potentially serious land stability problems.

Both proposed transportation corridor options traverse areas that have American Indian ritualistic value (Appendix K) and areas of serpentine barrens. Mills could be served in both counties by either of these optional routes but at significantly higher haul and construction costs than using the Chimney Rock Corridor route.

\* \* \* \*

**TABLE 13—VEHICLE EMISSIONS**  
**EMISSION FACTORS (GRAMS/MILE)**

Hydrocarbons		Carbon Monoxide	Oxides of Nitrogen
Total	Reactive		
9.0	8.4	67.8	6.0

**TOTAL EMISSIONS (GRAMS)**

Section	Total Hydrocarbons	Reactive Monoxide	Carbon Oxides	Nitrous Oxides
Chimney Rock (longest route)	92.8	86.6	698.4	61.8
Entire G-O Rd. (72 mi.)	647.0	604.0	4874.8	431.4

**CULTURAL RESOURCES.** Based on all cultural data, all of the proposed routes will create an adverse impact in one way or another. Some impacts appear to be non-mitigatable. The Forest is now requesting consultation from the State Historic Preservation Officer for California and the National Advisory Council on Historic Preservation.

The direct adverse effects of road completion would be alteration of the physical-environmental setting as it relates to feelings for the areas integrity and increased audio and visual intrusions that are out of character with the spiritual and religious environmental qualities desired by many American Indian users.

Interview data reflects that certain environmental qualities are desired in the practice of Indian religion; these qualities include silence, privacy and a natural environment that is not disturbed by unnatural activity.

Under 36 CFR part 800.3(a) indirect effects are defined as those caused by the undertaking that are later in time or further removed in distance, but are still reasonably foreseeable. Indirect effects include increased visitor usage that could result in disturbance of religious practitioners and increased vandalism.

*Alternative B.* There would be considerable cultural adverse effects associated with this alternative. Being on the ridge top the road would be highly visible during spiritual activities associated with the peaks and other high properties. There would be possible ground disturbing activities upon significant cultural properties. Finally, because this proposed alignment at its nearest point is approximately one-fourth (1/4) air mile from Chimney Rock, the possibility of adverse audible impacts is high.

\* \* \* \*



### IDENTIFICATION OF THE PREFERRED ALTERNATIVE

Based on the comparison and evaluation of all the Alternatives and the review of public comment during the review process, Variation D-4 is the recommended alternative.

*Discussion of Effects.* This section summarizes those effects, identified in the preceding section, that would result from the construction of the recommended Alternative, Variation D-4, and that cannot be avoided or materially reduced through the implementation of mitigation measures.

Soil erosion will increase slightly for a short period following construction.

Variation D-4 will alter 50 acres of vegetational habitat and its potential carrying capacity for wildlife. Another several hundred acres of habitats adjacent to the 6.02 miles of road will be indirectly affected. Wildlife species found in these roadside habitats will be subject to periodic disturbance from vehicles. Loss of 50 acres of habitat and roadside disturbances are not expected to create significant problems. Improved road access will increase hunting opportunity to a limited degree.

Beneficial impacts for wildlife are limited. Some edge will be created along the roadway which will favor deer and other edge associated species. Mitigation measures for habitat loss on this project will be meadow restoration and enhancement work in Elk Valley and surrounding areas.

Improved access to Blue Creek will likely increase the number of people fishing, but will not affect the aquatic habitat directly.

No known sensitive plant species will be directly affected. Two sensitive plants (California pitcher plant and California ladies slipper) exist on the flood plain terrace of Blue Creek; minor relocation of the road alignment to a point above a bog area will eliminate impacts.

Air quality effects will not be significant; increases in use will occur in the summer, while potential for in-

creased concentrations of the pollutant carbon monoxide occurs normally during the winter when the road will not be used.

Alternative D-4 may conflict with values associated with religious practices and beliefs of contemporary American Indian users of the project area. Consultation with the State Historical Preservation Officer and the National Advisory Council will be accomplished before this project is implemented.

Socioeconomic effects other than those based on timber are negligible. The change in haul costs may cause all of the timber harvest from the area served by the Chimney Rock Section to go to Del Norte County mills rather than to Humboldt County mills. Total employment in Del Norte County will theoretically increase by 203 with the rebuilding of the G-O Road, while decreasing by that amount in Humboldt County. A savings of 1,200,000 gallons of fuel consumption due to shorter haul distances and improved access will result over the first 30 years.

Light but increased recreational use will occur; administrative controls will be instituted if overuse occurs. Accessibility to and use of the Siskiyou Mountains area and the Siskiyou Inventoried Roadless Area to the north will increase slightly. Both hunting and fishing access will be improved. Variation D-4 will cross the potential Orleans inventoried recreational site, but not directly affect another potential site at Elk Valley. This route, as viewed from major viewing points, will result in attaining slightly lower visual quality objectives than is recommended based on existing landscape character types.

Most of the existing road could be converted to a recreation access route after the new road is built since its main function as a transportation route will no longer be needed.

Over the long term, both benefits and losses will accrue. A paved two-lane road will improve access, reducing some opportunities for solitude but permitting recreational use

by more people. It will also permit management of all resources to be achieved in the area through improved administrative access.

Completing the road will provide opportunity for a scenic recreational drive along a through route not presently available to the average motorist and will allow more people to visit the area than are able to do so now.

*Mitigation Measures and Guidelines.* The following actions will be taken to reduce the environmental effects of the preferred route, Alternative D4.

1. An inspection of the route before construction activity to check for sensitive plants and animals will occur. The Regional listing which is current at that date will be used. If sensitive species are found the project will be modified to follow existing Regional or Forest standards to provide the necessary protection.
2. Most of the existing road can be converted to a recreation access trail after the new road is constructed; this would include obliteration and revegetation of the roadway where possible. This action would reduce vehicle caused indirect effects to much of the cultural area in the vicinity of Chimney Rock, and in time would restore the location of the original road to a more natural state. It would also return about 15-20 acres of land to vegetation production for wildlife habitat and other benefits.
3. The Best Management Practices adopted by the Forest Service to comply with the Clean Water Act (Public Law 92-500) will be followed in design and construction of the new route.
4. The State Historical Preservation Officer and the National Advisory Council have been Council have been consulted with regard to the American Indian cultural values. We will continue to consult with them and adopt mitigation measures agreed upon.

# **PLAINTIFFS' EXHIBIT 46-A (Cultural Resources: Determination of Effect And Preliminary Case Report)**

## **PROJECT DESCRIPTION**

The proposed project is the construction of the Chimney Rock section of the Gasquet-Orleans Road (G-O Road), Six Rivers National Forest, California. The project area is located in Del Norte County, 17 air miles east of the community of Klamath. The project, a double-lane paved road with a 25 mile-per-hour design speed, would link the existing Summit Valley and Dillon-Flint sections, thus completing the G-O Road. The proposed Chimney Rock section represents 6.06 miles of the 55 mile road. The reader is directed to the Route Corridor Map and Draft Environmental Statement for the preferred alternative. Pages 7-21, in the Draft Environmental Statement give a detailed project description.

## **CULTURAL RESOURCES**

In order to insure adequate and timely consideration of archaeological and cultural values in compliance with various executive and congressional mandates and procedures, the USFS solicited information from local American Indians (Miller, 1975) and conducted an archaeological reconnaissance (Wylie 1976). The Forest Service also contracted two additional studies; A cultural-anthropological overview by Buckley in 1976 and a cultural anthropological/archaeological reconnaissance by Theodoreatus, Chartkoff and Chartkoff in 1979. The reader is directed to these enclosed studies for specific data which supports the summation to follow.

*Known Cultural Localities.* Through interviews, archival research, and archaeological reconnaissance twelve cultural/spiritual localities have been identified in the vicinity of alternate road locations in the Chimney Rock corridor.



In addition, archaeological fieldwork led to the inventory of approximately one-hundred fifty sites including trail markers, lithic scatters, trails, and tsektseks.

*Historic Non-Indian Use (ca. 1850-1920).* There is no record of non-Indian use before 1920 within the project area. The Kelsey Trail, a ca. 1851-1909 supply route from Crescent City to the interior, passed seven miles to the north and is not affected by this project.

#### Indian Use.

The abundant data (Wylie, Miller, Buckley, and Theodoratus, Chartkoff and Chartkoff) on this historic Indian use of the study area indicates:

A. Undisturbed, unaltered, and pristine areas are important to spiritual users.

B. Native American ritual activity in the study area began in prehistoric times, continued through historic times and continues at the present time.

The area through which the Chimney Rock Section of the G-O Road is planned is an area of religious activities and feelings for the Yurok, Karok and Tolowa Indian people who now use the area and have used it in the past. It is considered by these people as being their most important religious area.

\* \* \* \*

In 1976 Doctor Rock, Chimney Rock and Peak 8 were determined eligible for inclusion in the National Register of Historic Places. It was determined the properties were "associated with events that have made significant contributions to the broad patterns. . ." of the culture-history of (1) northwestern California Indians, (2) California Indians, and (3) American Indian cultures in terms of ideological belief."

On March 28, 1980 Six Rivers National Forest by letter (copy enclosed) requested a determination of eligibility from the Keeper of the National Register and the State Historic Preservation Officer for the Helkau District which encompasses all significant cultural-spiritual and archaeological sites identified in the Theodoratus, Chartkoff and Chartkoff (1979) study. To date the Forest has received no response from the Keeper of the Register as to the proposed Districts eligibility. However, Knox Mellon, State Historic Preservation Officer, California, in a letter (copy enclosed) dated May 2, 1980 states:

"I concur with you that the Helkau District is indeed eligible for the National Register of Historic Places under multiple resource criteria. The ethnographic, historic and archeological documentation you have provided unequivocally supports the contention that the district includes properties where cultural spiritual power quests have been and continue to be important and necessary activities to the maintenance of Tolowa, Yurok and Karok traditional culture (36 CFR 1202.6 a.) The ethnographical and historical data indicates that the spiritual leaders associated with these events are significant persons within Northwest traditional cultures (36 CFR 1202.6. b). The data associated with archeological and historic properties located within the proposed district are likely to yield important information about an area where little is known of past events and culture (36 CFR 1202.6 d).

#### DETERMINATION OF EFFECT

All of the cultural resources investigations document that building the road on any of the proposed routes would create an adverse effect. When applying the criteria



of adverse effect in 36 CFR Part 800.3(b) to the cultural resources, two conditions are applicable. They are:

- 1) Isolation from or alteration of the property's surrounding environment,
- 2) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting.

The direct adverse effects of road completion would be alteration of the physical-environmental setting as it relates to feelings for the areas integrity and increased audio and visual intrusions that are out of character with the spiritual and religious environmental qualities desired by many American Indian users.

There will be no direct ground disturbing effect upon any significant archaeological property within the preferred route corridor. Site records for \* \* \*.

**PLAINTIFF'S EXHIBIT 6 (American Indian Religious Freedom Act Report)**

**I. INTRODUCTION—HISTORICAL OVERVIEW**

A missionary once undertook to instruct a group of Indians in the truths of his holy religion. He told them of the creation of the earth in six days, and of the fall of our first parents by eating an apple.

The courteous savages listened attentively, and, after thanking him, one related in this turn a very ancient tradition concerning the origin of the maize. But the missionary plainly showed his disgust and disbelief, indignantly saying:

"What I delivered to you were sacred truths, but this that you tell me is mere fable and falsehood!"

(*The Soul of the Indian*—Charles Eastman)<sup>1</sup>

**Historical Treatment of Native American Religions**

The incident involving the exchange of creation stories gives an eloquent testimony to the manner in which non-Indians have generally received the Indian religious tradition. While proclaiming their own traditions to be infallible and literal truths, non-Indians have not accorded other religions the same courtesy. Indeed, Eastman's story continues with the Indians reproving the missionary for his lack of manners and his violation of the rules of civility.

The Spanish, uncertain about the theological status of the Natives, and to make certain that conquests proceeded according to Christian principles, adopted the famous "Requirement," which had to be read formally to the Indians they encountered before any hostilities could commence. The *Requirement* began with a brief history of

<sup>1</sup> THE SOUL OF THE INDIAN, Charles Eastman, Houghton Mifflin Co. Cambridge, Massachusetts, 119-120.

the world since its creation, continued with an account of the establishment of the Papacy and described the donation by Pope Alexander IV of the lands then occupied by the Indians to the kings of Spain. The Indians, after hearing these sacred words, were supposed to acknowledge the lordship of the kings of Spain and to allow the Christian faith to be preached to them. Failure to surrender to the Spanish by the Indian justified whatever cruelties then followed and made the ensuing war theologically proper. While harsh in the extreme, this formalization of religious conflict at least had a theological and doctrinal base that the Europeans understood and which the Indian came rapidly to understand and abhor.<sup>2</sup>

The Pilgrim Fathers adopted a similar posture. They lacked the absolute authority which the Papacy gave to the Spanish but consoled themselves with sermons by John Cotton, Cotton Mather and Increase Mather, or the strong opinions of William Bradford. Conflict was not long in coming after the landing of the Pilgrims. When John Robinson wrote to William Bradford in 1623, he expressed great concern about the killing of several Indians: "Concerning the killing of those poor Indians, of which we heard at first by report, and since by more certain relation. Oh, how happy a thing had it been, if you had converted some before you killed any!"<sup>3</sup> Later, when the whites of Massachusetts surrounded the principal village of the Pequots and burned it with all the Indian inhabitants, Bradford was to remark in his *History of Plymouth Plantation*:

Those that scaped the fire were slaine with sword; some hewed to peeces, others rune throw with their rapiers, so as they were quickly dispatchte, and very

<sup>2</sup> ARISTOTLE AND THE AMERICAN INDIANS, Lewis Hanke, Indiana University Press, Bloomington, Indiana, 1959, pp. 15-16.

<sup>3</sup> THE INDIAN AND THE WHITE MAN, Wilcomb Washburn, Anchor-Doubleday, New York, 1964, pp. 176-177.

few escaped. It was conceived they thus destroyed about 400, at this time. It was a fearful sight to see them thus frying in the fryer, and the streams of blood quenching the same, and horrible was the stinck and sente there of; but the victory seemed a sweete sacrifice, and they gave the prayers thereof to God, who had wrought so wonderfully for them, thus to inclose their enemies in their hands, and give them so speedy a victory over so proud and insulting an enemy.<sup>4</sup>

Repulsive as this history must be, it is important that it be understood in the broader historical perspective. The adoption of the United States Constitution, with its prohibition of any governmental establishment of religion and guarantees of religious freedom, signified a new sense of religious maturity greatly transcending previous views of the relationships of Christians and Natives.

Post-Revolutionary pressures on the tribes east of the Mississippi presented great difficulties. During the first three-quarters of American political existence, Christian missionaries were critically important in providing educational services to the tribes and interceding for them with government officials. Indeed, the Rev. Samuel Worcester and some other committed missionaries, learning of the dilemma presented by the Supreme Court decision in *Cherokee Nation v. Georgia*<sup>5</sup>, which denied the Cherokees standing to bring a suit against the state, voluntarily accepted the laws of the Cherokees, thereby suffering arrest and imprisonment by the state and initiating the companion case, *Worcester v. Georgia*<sup>6</sup>, which upheld the treaty rights of the tribe.

<sup>4</sup> THIS COUNTRY WAS OURS, Virgil J. Vogel, Harper & Row, New York, 1972, p. 42.

<sup>5</sup> 5 Pet. 1 (1831).

<sup>6</sup> 6 Pet. 515 (1832).

Involvement of the missionaries in tribal affairs was not on the basis of Indian religious freedom, but primarily for the purpose of converting the Natives. Freedom of religion became quickly submerged when missionary endeavors and government policy became synonymous. Andrew Jackson, in his second Annual Message, described the progress in removing the Five Civilized Tribes from their homelands in the South and justified the Removal policy with the optimistic prediction that:

It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.<sup>7</sup>

The coalescence of government and religious goals which was achieved before the Civil War became the predominant theme of interpretation for both churches and government agencies. Commissioner Taylor, a member of the Indian Peace Commission of 1867-68, remarked in 1868 in his annual report as Commissioner of Indian Affairs:

. . . Assuming that the government has a right and that it is its duty to solve the Indian question definitely and decisively, it becomes necessary that it determines at once the best and speediest method of its

<sup>7</sup> Richardson, J.D. ed. *A Compilation of the Messages and Papers of the Presidents*, II, p. 519.

solution, and then, armed with right, to act in the interest of both races.

If might makes right, we are the strong and they the weak; and we would do no wrong to proceed by the cheapest and nearest route to the desired ends and could, therefore, justify ourselves in ignoring the natural as well as the conventional rights of the Indians, if they stand in the way, and, as their lawful masters, assign them their status and their tasks, or put them out of their own way and ours by extermination with the sword, starvation, or by any other method.

But Taylor, recognizing that such a course of action would be a step backwards unworthy of the United States argued:

If, however, they have rights as well as we, then clearly it is our duty as well as sound policy to so solve the question of their future relations with us and each other, as to secure their rights and promote their highest interest, in the simplest, easiest, and most economical way possible.

But to assume they have no rights is to deny the fundamental principles of Christianity, as well as to contradict the whole theory upon which the government has uniformly acted toward them; we are therefore bound to respect their rights, and, if possible, make our interests harmonize with them.<sup>8</sup>

That Christianity and federal interests were often identical became an article of faith in every branch of the government and this pervasive attitude initiated the contemporary period of religious persecution of the Indian religions. It was not, to be certain, a direct attack on Indian tribal religions because of their conflict with Christianity, but an oblique attack on the Indian way of life that

<sup>8</sup> *Report of the Commission of Indian Affairs*, 1869, p. 16.



had as its by-product the transformation of Indians into American citizens. Had a Christian denomination or sect, or the Jewish community been subjected to the same requirements prior to receiving affirmation of their legal and political rights, the outcry would have been tremendous. But Indians, forming an exotic community which few understood, were thought to be the proper object of this concern. Thus the Supreme Court, in deciding an important law suit involving a conflict between the Missouri, Kansas, and Texas Railroad Company and the Osage Indians, justified its decision as follows:

Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is to be presumed, as stated by this court in the *Buttz* case, that in its exercise the United States will be governed by *such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race . . .* (Emphasis added)<sup>9</sup>

Legislation also bore the imprint of this attitude. Mr. Perkins, Representative from Kansas, warmly endorsed the Dawes Severalty Act on the floor of House of Representatives, proclaiming:

This bill is in keeping with the sentiment of the country, as it is, in my judgment, responsive to the best interests of the Indians, the best interests of the whites, and the best interests of the country generally. It has the warm endorsement and approval of the Secretary of the Interior, of the Commissioner of Indian Affairs, and of all those who have given attention to the

<sup>9</sup> *Missouri, Kansas, & Texas Railway Co. v. Roberts*, 152 U.S. 114, 116-118, (1894).

subject of the education, the Christianization, and the development of the Indian race.<sup>10</sup>

Church groups enthusiastically endorsed the Dawes Act and pushed for its passage. Bishop Hare of the Episcopal Church, when informed of its enactment was heard to remark that "time will show whether the world or the Church will be more alert to take advantage of the occasion." The Church came in a distant second.

The executive branch, charged with administering the Indian agencies, represented the government's most persistent presence in suppressing the tribal religions. Most agents were political appointees, chosen for a long time with the consent of Church groups, and their religious bias was enhanced and strengthened by a dreadful ignorance of the parameters of tribal religions. Interpreting religion as primarily a belief system according to the familiar outlines of institutional religion with which they were familiar, many of the agents were horrified with the Indian ceremonial life and sought ways to suppress it. Very few non-Indians could distinguish between a war dance and any other kind of dance. Since the war dance in popular fiction, from James Fenimore Cooper to dime novels, was characterized as a prelude to savagery, dancing was particularly distasteful to non-Indians who were charged with performing various functions dealing with the tribes.

Examples of the sustained campaign conducted by federal employees against Indian dancing are numerous and in almost every instance the dances are characterized as representing barriers to government objectives in an unrelated field such as economic development, education, and reservation government. The prohibition against dancing was, in a larger context, the effort to transform Indian social life into a replica of the non-Indian social life

<sup>10</sup> *Congressional Record*, 49th Congress, 2nd Session, December 15, 1886.

since dancing was only the external and most obvious expression of a deeper, more sublime, and more sophisticated social manifestation of the Indian personality. In 1877, the Indian Agent for the Yankton Sioux reported his attempt to educate the Sioux to a different form of economic activity. He identified their social functions as a handicap in their progress toward this goal:

As long as Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, community in food, heathen ceremonies and dances, constant visiting—these will continue as long as the people live together in close neighborhoods and villages . . . I trust that before another year is ended they will generally be located upon individual lands of farms. From that date will begin their real and permanent progress.<sup>11</sup>

This then was taken up by officials in the Bureau of Indian Affairs. When the regulations under which the Indian courts were to be operated were revised by Commissioner Thomas Morgan in 1892, the first offense specified in the new regulations read:

(a) Dances, etc. — Any Indian who shall engage in sun dance, scalp dance, or war dance, or any other similar feast, so called, shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his rations for not less than ten nor more than thirty

<sup>11</sup> *Report of the Commissioner of Indian Affairs*, (1877), pp. 75-76.

days, or by imprisonment for not less than ten nor more than thirty days.<sup>12</sup>

Suppression of religious practices by the reservation agents was a major factor in the reluctance of the Indians to adopt the white man's ways and, since it alienated the people unnecessarily, inhibited government programs during the time it was enforced. Indians quickly found ways to subvert the Bureau of Indian Affairs regulations. The Lummi and Nooksack peoples of Washington State performed their most important ceremonies on national holidays deliberately informing their agent that they were performing these rituals to honor the United States. The suppression of Indian dancing continued until the Indian Reorganization Act of 1934 and Indian religious freedom was one of the most important reforms initiated by John Collier as Indian Commissioner. A scant twelve years before Collier's reform, however, the Office of Indian Affairs released Circular No. 1665 (April 26, 1921) which reads:

The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian Offenses" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.

In reviewing the history of federal treatment of Indian religions, it is important to note that little deliberate effort was made to eliminate religious practices because of their theological content. In this respect, the American treat-

<sup>12</sup> *Report of the Commissioner of Indian Affairs*, (1892), p. 29.



ment has been significantly more intelligent and responsive than previous treatment of Indian religions by both the Spanish and English colonial officials. There is one significant exception to this rule, however, and that consists of the violation of the sacred Pipestone Quarry in Minnesota. The quarry was a religious site of great importance to tribes for nearly a thousand mile radius. The quarry was under the protection of the Yankston Sioux people and in their treaties they took particular pains to ensure its sanctity. According to research done by their attorney, Jennings C. Wise (at one time an Assistant Attorney General of the United States), this quarry was deliberately damaged by the construction of a railroad through it in 1891 at the instigation of federal officials and missionaries who wished to destroy its value as a religious site. According to Wise, the sacred ledges which created the falls were deliberately blasted to erase all traces of their former outlines and to render them useless for ceremonial purposes.

In recent decades, there has been considerable interest in restoring both sacred lands and access to sacred places within the various federal lands to the religious leaders of the respective tribes. A major positive step in this respect was the return of the Blue Lake area to Taos Pueblo in 1973 and Mount Adams to the Yakima Nation in 1974. Although these land restorations were controversial at the time, they have been accepted as a tangible expression of the desire by the federal government and non-Indians to make amends for the previous suppression of Indian ceremonial life. Neither sacred site was diverted to other uses because of its religious significance, however, and so the solution of these specific problems is more in line with the types of continuing problems suffered by practitioners of Indian religions than the Pipestone Quarry situation.

The most critical aspect of past federal treatment of Indian religious activities, practices, and sacred locations

is that abuses have for the most part arisen because of ignorance or misunderstanding on the part of the non-Indian. The treatment exemplifies what can happen to a religious minority when its tradition is radically divergent from that of a majority in a society. Fortunately, there are no major theological barriers to confront but only the lack of precise knowledge, coupled with a lack of respect which such ignorance brings. In order that the progress already made be used as a cornerstone for enduring and fundamental changes, it is necessary to probe deeper into the theoretical gulf which presently separates the Indian religious tradition from that tradition which is commonly accepted by the non-Indian majority. Only when some of the assumptions and presuppositions are clarified and each side can understand and communicate with the other can true understanding occur to prevent future conflicts in this delicate area of religious practice and freedom. One of the present difficulties plaguing non-Indians is the question of when protection of religion becomes its establishment. The next section deals specifically with this question.

#### Religion and Culture

A vast difference exists between the major or "world" religions and the religions of smaller tribal groups. This difference can be seen in every instance of contact, whether between the western religious traditions and the tribal peoples they have encountered or the established eastern religions and the corresponding tribal people they have encountered. The larger religions can best be described as "commemorative" religions. That is to say, these religions trace their origins back to a specific person or event (The Exodus, Jesus, Mohammed, Buddha, etc.) and the major portion of the religion deals with commemorating these sacred events in the proper ceremonies and rituals (Holy Communion, Passover, etc.).



The larger religions have as the mainstay of their beliefs the doctrine that their particular interpretation of reality is the most accurate expression of ultimate truth. In most instances this truth is revealed by the founder of the religion to a specific group of disciples with instructions to preach and teach others to accept the body of truths which has been set down. From this orientation, doctrines, dogmas, creeds and catechisms have been derived which are said to express the truth of the religion in more expanded and intelligible form. Doctrines concerning the person of Jesus and Buddha each took nearly half a millenium to formulate. In each generation, the theological enterprise of most major religions—but these two in particular—has been to restate the sacred truths for the society of its time.

Because of the extreme complexity of this enterprise and the absolute nature of the claims made by the major religions, in each instance religious institutions have been necessary so that the beliefs and formulas of the religion are not diluted by succeeding generations. Religion in many traditions, but particularly in the tradition of the west, has become an institutional activity and whenever this institution has too closely aligned itself with the political, social, economic, or educational structures, dissident groups seeking to return to the tradition have been produced. The religious tradition thus grows and expands through the production of beliefs and interpretations, heretical in one generation, the accepted interpretation in later generations.

Since these religions are commemorative and depend upon a reenactment of the original revelation, the location of rituals and ceremonies is not nearly as important as the continuing tradition in which the original truth is manifested. History and cosmic process thus become critical to these religions and eventually the claim is advanced that their conception of deity includes dominance over the historical process. Whether this process is con-

ceived as an inexorable motion of a series of events, chronology of the religion is critically important and appeals are continually made to the "Faith of Our Fathers" with efforts in worship devoted to as close a recapture of original events as is possible. The "laws" of God, as expressed in doctrine, dogmas, creeds and catechisms, are infallible guidelines for relating to the march of history or the cosmic process.

Western people, particularly those presently inhabiting the United States, originate from this tradition. Many of the first people to arrive on these shores came because of the oppression they experienced when a select group of individuals dominated their religious institutions and forced them to accept beliefs and practices which they considered foreign, heretical, or unfaithful to the tradition. From these bitter experiences came the demand, upon the adoption of the Constitution, but first incorporated in Virginia's Bill of Rights, that no religious institution could be established by or become the official religion of the political institutions. Thus religious controversy which has plagued Europe and Christendom and which had flourished briefly in established denominational expressions in the colonies, had to be laid to rest permanently.

The smaller or tribal religions represent the opposite pole of human experience. Instead of commemorating events, these religions are what could best be described as "continuing" religions in that they are not traced to a founding or founder. Their origin is clouded beyond recovery and almost all of them can be said to be older, in a chronological sense, than the founded religions since we must assume that they existed in one form or another before the founding of any of the major religions, almost all of which can be dated with a fair degree of accuracy.

The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must be conducted in accordance with

the instructions given in the original revelation of each particular ceremony or ritual. Of critical importance in this respect is the manner in which ceremonies arise. These religions have the ability and propensity to experience new revelations and each new ceremony which is received by the religious community is given for a specific purpose and must be performed at the place and in the manner, and wherever the original revelation demands, at the time designated. American Indian tribal religions, in many instances, have acknowledged that the present ceremonies, given to them at the beginning of this world, must be performed continuously or great harm and destruction will come to the people.

No doctrines, dogmas, creeds, or catechisms are permitted in these religions since these statements are secondary to the ceremonies and basically commentaries on them or interpretations of the original revelations and this kind of speculation is an absolute violation of the ceremony itself. Instructions are passed from individual to individual as tribal elders perceive the personalities, capabilities, and temperaments of younger tribal members. Since the instructions generally pass from individual to individual, and since the test is the successful transmission of the task, no institutions can arise in these religions. Only one interpretation is possible in each generation.

Religious growth is possible when a tribal individual receives a particular ceremony and instructions respecting it. Heretical and dissident groups, until very recently, did not exist because there was no central set of beliefs against which such contentions could have been measured. Either the ceremonies helped to fulfill tribal existence or they didn't and the test was in their efficacy, not their logic or rationality. Divergent traditions within a tribe, because they were all acceptable ceremonies, came to share the ceremonial year and were recognized as dealing with

specific situations. Unlike the larger religions, the ceremonial year did not commemorate specific chronological historical events, and some ceremonies were reserved for occasions that warranted them. Not all ceremonies needed to be performed each year in the manner that the Christian year follows the life and passion of Jesus, for example. Some tribes in the Pacific Northwest had a "rain dance" in a region where it rains continually. The purpose of this dance was severely restricted, however, and was used only once or twice in each generation on those occasions when an unusual snow had made travel impossible. The dance brought rain which melted the snow and restored conditions to normal.

The most distinctive difference between the tribal religions and the larger religions in theological terms must certainly revolve about the idea of creation. For the larger religions the diety is the Creator who institutes natural laws which then govern the operation of physical nature, in most instances placing within our species an ability to recognize although not always fulfill the requirements of the moral dimension of the natural law. This natural law is the basis of the Declaration of Independence and it is to the free exercise of human conscience recognized in this law that the signers of the Constitution appeal. The ethics of other large religions have similar versions whereby they incorporate cosmic process and human conscience. But in this understanding a critical distinction is made between the world as created and the actual processes by which it operates.

The tribal religions regard the world as a continual process of creation and their concept of creator is simply one of identity, not one of function. With the world in a continual state of growth, creation being continuous, the requirement laid upon the human species is to move with cosmic growth and participate in it since we are part of it and do not stand outside it. The primary essence of the



tribal religions is to remain in a constant and consistent relationship with nature and moral and ethical considerations must originate in a world which demands mature responsibility. Customs which adjust to the natural world and its inhabitants thus dominate the tribal religions where laws and institutions are the dominant factors in the larger religions.

When the freedom of religion is discussed in the context of the tribal traditions, it is the right to adjust to and maintain relationships with the natural world and its inhabitants that is addressed. Since each living entity is unique no authority can determine in advance what the specific occasion will require apart from the tradition which is being passed down. The ceremonies and rites themselves set fairly precise rituals and reveal in the performance of the acts their continuing efficacy. While no future revelations can be ruled out, it would be the rarest of events for a new ceremony to be introduced. Except in the most remote areas of Indian country, the urbanization of North America has precluded both Indian and non-Indian from the constant relationship with the natural world that would be conducive to the revelation of further ceremonies.

The establishment of a religion is not a problem when viewed from within the tribal context although tribes today live within the larger society. Establishment is fundamentally the imposition by the political institution of forms of belief and practice which are in conflict with or are distasteful to people of a different tradition. Protecting Indian religious practices from curiosity seekers, casual observers, and administrative rules and regulations is the only practical way that religious freedom can be assured to Indian tribes and Native groups. It is not the establishment of their religion because their religions, not being proselytizing religions, seek to preserve the ceremonies, rituals and beliefs, not to spread them.

Complaints occasionally arise that Native American religions have an exclusivity which, if protected, would mean the establishment of a tribal religion, in contrast to the separation of church and state which forms the basis of American civil freedom. But this complaint is based upon the transfer of cultural attitudes and beliefs; most of which reveal the lack of understanding of Indian tribal religions, to the actual practices of the religions themselves. Not only are non-Indians excluded from some tribal religious ceremonies, but the unpurified Indians from outside the particular tribal traditions are excluded also. Unlike institutional religion, the tribal religions do not depend upon community participation, but upon the proper performance of the ceremonies. Exclusion is central to many ceremonies because participation is restricted to designated religious figures within the community according to the nature of the ceremony. Just as certain figures are the only ones ordained or designated to perform certain functions in the institutional religions, so in the tribal religions, there can be no ceremonies unless the proper persons perform them.

#### **Native American Religious Freedom**

The American Constitution represented a milestone in human thought. Separation of church and state and the guarantee of the sanctity of individual religious belief were radically new concepts in human government uniquely American in operation if not origin. The American experience has been one of building upon the foundations established by the Constitutional fathers and each generation has improved upon and sharpened the understanding of religious freedom in this country.

The Indian Reorganization Act recognized the difference in the cultural base of American Indian communities and established a principle of non-interference in Indian religious activities. Lifting the threat of intervention did



not, however, guarantee religious freedom for American Indians because the nature of religious differences precluded proper understanding of the elements involved in tribal religions. During the 1970s with the restoration of the sacred lands of Taos Pueblo and Yakima Nation, additional recognition was given to the Indian religious traditions and its sometimes special needs for preserving intact those places sacred to particular Indian religions and communities.

House and Senate religious freedom resolutions enacted in the 95th Congress made explicit sentiments and understandings which had been implicit and growing during the preceding half century. It marked a formal recognition that interpretation of the freedom of religion and establishment clauses in the American Constitution were sufficiently broad to include religions of historically and culturally different peoples. This resolution recognized also that past treatment of American Indian religious ceremonies and practices had been uneven and has been conducted in an atmosphere of misunderstanding and lack of information which had at times produced hardships unnecessarily.

In recent decades, American society has become more sophisticated about the nature of religious conscience and more concerned about establishing guidelines for institutional activities so as to preclude them from unnecessarily creating hardships for individuals who sincerely attempt to live full and constructive lives based on a mature understanding of human existence. The modern period can be said to have originated with the dissenting opinions in the *Macintosh*<sup>13</sup> case in 1931. That case dealt with the question of whether the statutory requirements for naturalization were satisfied by an applicant who testified that he was not willing to commit himself beforehand to

<sup>13</sup> 283 U.S. 605 (1931).

bear arms in defense of the United States since he wished to reserve the right of moral judgment until confronted with a specific factual situation that demanded solution. Thereafter a line of cases leading directly to *U.S. v. Seeger*<sup>14</sup>, which affirmed the exemption from the Universal Military Training and Service Act of 1948 for conscientious objectors, served to expand public awareness of the social value of informed individual conscience. Today there is considerable concern with protecting the right of individual choice and personal growth in all areas of law.

The western tradition is based largely upon the principle of individual choice with the assumption that individuals honestly searching for solutions will arrive at understanding not radically variant from the teachings of the major religions as they have been traditionally experienced. The case of the American Indian has strong parallels to this principle, its only caveat being that the choice has already been made, by a community, prior to contact with other societies, and that communal conscience requires that the ceremonies be continued as they have traditionally been constituted and practiced. Once this parallel is understood, the problem of religious freedom of tribal peoples should present little difficulty. A few examples of misconception of the situation should illustrate the manner in which shortsighted or misguided interpretation of the behavior and beliefs of Indian communities has precluded Indian religions from assuming their rightful place in the mosaic which constitutes the American religious freedom tradition.

In 1882 the Sioux medicine man Crow Dog killed a leading chief of his tribe, Spotted Tail. Under the tribal traditions Crow Dog and his family made adequate compensation for the killing and the matter was considered closed by the Sioux. Since Spotted Tail was a well-known

<sup>14</sup> 380 U.S. 163 (1965).

chief who had consistently sided with the United States, his murder set off a wave of public concern and Crow Dog was tried by a federal court in Deadwood, South Dakota and found guilty of first degree murder. His case was taken to the Supreme Court on a question of jurisdiction over the subject matter and the Court found for Crow Dog's position. Noteworthy is the comment by the Court in its opinion that imposition of an external federal law upon the Sioux:

. . . tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; *one which measures the red man's revenge by the maxims of the white man's morality.* (Emphasis added.)<sup>15</sup>

Viewing the Indian religious tradition through culturally-biased glasses, the Court characterized the Sioux penalty for murder as the "red man's revenge," describing the federal law as the "white man's morality." In point of fact, the Sioux tradition required that compensation be made to the family of the victim and did not require retribution except in the most severe circumstances. The "white man's morality," however, demanded retribution in the form of capital punishment. The descriptions of each way of dealing with the crime derive not from an understanding in the jurisprudential sense but from popular misconceptions about who the people are. Today, the two different approaches to the crime might be characterized in reverse order, describing the white man's morality as savage and barbaric and the Indian approach:

<sup>15</sup> *Ex Parte Crow Dog*, 19 U.S. 556, 571 (1883).

humane and sophisticated. Indeed, several states have adopted compensation to victims of crimes as a principle of their criminal and civil codes.

In 1884, Senator Henry Dawes of Massachusetts visited the Five Civilized Tribes of Indian Territory (now the state of Oklahoma) to examine their method of land tenure, a practice which derived directly from their religious understanding of human relationships to the earth. Reporting the next year to the 1885 Lake Mohonk Conference which concerned itself with the formulation of Indian policy, Dawes remarked:

The head chief told us that there was not a family in that whole Nation that had not a home of its own. There was not a pauper in that Nation, and the Nation did not owe a dollar. It built its own capitol . . . and it built its schools and its hospitals. Yet the defect of the system was apparent. They have not got as far as they can go, because they own their land in common. It is Henry George's system, and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.<sup>16</sup>

Discovering a political system with complex institutions which did not owe a cent and experienced no poverty within its society should have made Senator Dawes take notice and learn. With his predetermined idea of civilization, however, he could only described the state of well-being of the Indians as a negative situations. Today as we strive to create Great Societies and resolve the problems of

<sup>16</sup> *Lake Mohonk Conference Proceedings*, 1885, p. 43.



poverty, education, health care and the like, most Americans wish they could achieve the standard of civilized existence enjoyed by the Five Civilized Tribes in the 1880s.

These examples should forewarn us that application of a rigid set of criteria to human behavior without considering alternatives is dangerous at best and generally hazardous in its contemplation. The dreadful poverty and crime statistics which plague American Indian communities today are the result of misinformed neglect of the Indian religious tradition and the imposition of a set of external institutions and criteria on Indian communities. No deliberate effort was made to destroy the Indian institutions because of their divergent religious beliefs and practices. Yet few people in the previous century understood the larger parameters of social reality and tended to prejudge the Indian tradition according to the principles of their own cultural tradition.

With the enactment of the American Indian Religious Freedom Act, our Nation is being afforded the opportunity to correct past injustices and to begin anew with regard to treatment of those who adhere to the tenets of traditional Native religions. In countless ways in the past and present, both our government and our people have proved themselves equal to challenges inherent in new beginnings. This will be no exception.

## II. CATEGORICAL ACTIONS UNDER THE ACT

### A. White House

On August 12, 1978, the President issued the following signing statement on Senate Joint Resolution 102 on American Indian Religious Freedom:

I have signed into law S.J. Res. 102, the American Indian Religious Freedom Act of 1978. This legislation sets forth the policy of the United States to pro-

tect and preserve the inherent right of American Indian, Eskimo, Aleut, and Native Hawaiian people to believe, express and exercise their traditional religions. In addition, it calls for a year's evaluation of the Federal agencies' policies and procedures as they affect the religious rights and cultural integrity of Native Americans.

It is a fundamental right of every American, as guaranteed by the First Amendment of the Constitution, to worship as he or she pleases. This act is in no way intended to alter that guarantee or override existing laws, but is designed to prevent government actions that would violate these Constitutional protections. In the past government agencies and departments have on occasion denied Native Americans access to particular sites and interfered with religious practices and customs where such use conflicted with Federal regulations. In many instances, the Federal officials responsible for the enforcement of these regulations were unaware of the nature of traditional native religious practices and, consequently, of the degree to which their agencies interfered with such practices.

This legislation seeks to remedy this situation.

I am hereby directing that the Secretary of the Interior establish a task force comprised of representatives of the appropriate Federal agencies. They will prepare the report to the Congress required by this Resolution, in consultation with Native leaders. Several agencies, including the Departments of Treasury and Interior, have already taken commendable steps to implement the intent of this Resolution.

I welcome enactment of this Resolution as an important action to assure religious freedom for all Americans.

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### C. Summary Statement, Member-Agencies

#### 1. Department of Agriculture

##### a. Forest Service

The Forest Service has had a continuing policy to seek out and involve the public in the development of management direction. Over the years local managers have worked closely with representatives of Indian groups in the planning and decision-making process. This input has been given full consideration in the formation of policies and procedures, both on a national and a local basis. With the passage of the American Indian Religious Freedom Act, a new awareness of the needs of the Native American is occurring within the Agency.

A task force was formed to review and evaluate the policies and procedures of the Forest Service relevant to American Indian religious freedom and to recommend changes as necessary. An interim policy was established directing line management officials at all levels that:

"In the preparatory stage of land management planning, native traditional religious leaders will be notified of all public involvement activities and invited to provide input. If an issue concerning Indian religious freedom is identified, the cultural resource overview for the forest plan should provide substantive background on the traditional Indian religious practices within the planning area. When examination and consultation determine a need to protect and preserve certain lands or sites, this will be accomplished in and through the land management plan.

"Each application by traditional Native Americans to use National Forest System lands for religious purposes shall be carefully considered. The careful consideration shall include those instances where a request involves an area under restrictions which would normally preclude the activity."

\* \* \* \* \*

### III. RECOMMENDATIONS

#### A. Land

##### 1. Background – Statement of Issues

The attachment of the Native American people to the land is a fact well noted in American history. Treaties, agreements, executive orders and special statutes have provided for a land base for most Indian governments and their citizenry. While the use of the reservation system in this country has successfully accomplished the intended purpose, the rigid application of this same system, over time, has produced an unintended result. Many Native people have been effectively denied access to off-reservation areas used for the gathering of natural products necessary for healing and ceremonial purposes, and access to areas containing sacred sites or holy places revered in Native traditions.

Many of these places are now held by the federal government for a variety of purposes, most of which are compatible with the Native religious use. The accommodation of Native religious uses within federal land management programs must take into account their desire for these lands to remain in their natural state.

The indigenous natural substances of the land are an integral part of the Native religions. Proper gathering of the natural products is essential to ensure their efficacy in later use. The time chosen for the gathering may be determined in a number of ways: 1) the immediacy of the need for a particular substance; 2) the problems of arranging travel to distant places for a specific natural product; and 3) the tribal tradition of the individual's particular belief, which may require a certain period for gathering, often based on the occurrence of the seasons or other natural events, with the time of day prescribed similarly.

The persons who are to engage in the gathering may be subject to specific religious laws regarding their immediate

past behavior, and may have undergone preparatory rituals. The presence of others is often controlled because of beliefs that the substance itself may be affected by the proximity, behavior or condition of all persons. Those who are to gather the substance are often required to achieve a proper state of mind prior to entering the physical presence of the natural product to be gathered.

The place of the gathering may be determined by tradition, known availability of the natural product and accessibility, or may involve a ritual search. The gathering may be carried out immediately or it may take place for a long time, depending on the amount needed and the religious instructions governing supply and method of gathering. The amount gathered varies according to the purpose of the gathering: one deer four times a year for certain ceremonies, a small collection of first shoots of a particular plant, a year's supply of clay to make paint, for example.

The Native peoples of this country believe that certain areas of land are holy. These lands may be sacred, for example, because of religious events which occurred there, because they contain specific natural products, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds or because they are sites conducive to communicating with spiritual beings. There are specific religious beliefs regarding each sacred site which form the basis for religious laws governing the site. These laws may prescribe, for example, when and for what purposes the site may or must be visited, what ceremonies or rituals may or must take place at the site, what manner of conduct must or must not be observed at the site, who may or may not go to the site and the consequences to the individual, group, clan or tribe if the laws are not observed.

The ceremonies may also require preparatory rituals, purification rites or stages of preparation. Both active participants and observers may need to be readied. Natural substances may need to be gathered. Those who are unprepared or whose behavior or condition may alter the ceremony are often not permitted to attend. The proper spiritual atmosphere must be observed. Structures may need to be built for the ceremony or its preparation. The ceremony itself may be brief or it may last for days. The number of participants may range from one individual to a large group.

Both gathering of substances and ceremonial uses of federal lands are limited by federal laws, regulations and practices, including certain federal procedures deferring to restrictive state laws or practices, particularly in the hunting, fishing and gathering areas. Native religious use has not been specifically included in the purpose for which the land is held by the federal agencies, nor has it been recognized as a use of such land. The American Indian Religious Freedom Act recognizes the need for a type of permanent easement for Native religious gathering and use of the federal lands, which is discussed later in this section.

The accommodation of Native religious use of federal lands has been accomplished in an uneven and arbitrary fashion, often involving arduous litigation or special legislation. Physical access to lands has been denied to Native people because of necessary military considerations, and some federal lands have controlled access because of the purposes for which the land is held, such as primitive and wildlife management areas. Native access is also limited by fire-control regulations.

This controlled access has severely limited the Native religious use, or has placed the Native peoples' use outside the protection of the law. Gathering of natural products or substances on some federal land is controlled by specific statutes. Regulations on other lands allow for waiver of



fees and exceptions for personal use, which now may be used for native religious gathering. The leasing of some federal lands effectively prevents the Native religious use of these lands, and especially affects the gathering of natural products, which are often destroyed or damaged by the lessee's use of the land. The gathering of a specific plant or animal may be forbidden or limited by conservation statutes. Prohibitions on the building of structures may limit Native use of ceremonials requiring the building or erecting of arbors and other structures. The condition of jurisdiction, in some cases, may subject the Native religious use to state and territorial laws.

Physical access to the land and its natural products must also include the preservation of the natural conditions which are the *sine qua non* of that access. The efficacy of the natural products and the spiritual well-being of the sacred sites are dependent upon physical conditions. Changing of physical conditions—the spraying and logging of trees, unlimited trapping or removal of original species, alteration of the terrain through river channelization, dams and other methods—not only damages the spiritual nature of the land, but may also endanger the well-being of the Native religious practitioners in their role and religious obligation as guardians and preservers of the natural character of specific land areas.

Preservation of the natural character of the land is often made needlessly difficult through such management practices as chaining to remove natural trees, failure to prevent overgrazing during dry periods and overlooking of sources of non-point source water pollution. These practices endanger the natural supply of the substances required by the Native religions, and may damage the character of land areas which are extremely sensitive to the actions and consequences of modern life.

Inadequate control of tourism threatens the offerings left at sacred sites and gathering areas. Often, easements

across Native lands are granted to the general public without regard to their impact upon sacred sites and the privacy of Native religious practitioners. Vandalism at holy places, especially burial sites and ruins, endangers their very existence. Rituals which require differing forms of privacy have been covertly observed, interrupted and affected through the presence and activities of unauthorized observers. The privacy needed for rituals varies from tribe to tribe, ranging from the exclusion of certain members of the group from plant-gathering and other rites to the exclusion of all non-participants for the duration of the ceremony. All restrictions are designed to assure that the rituals and ceremonies are conducted, performed and observed, without interruption and in accordance with Native American religious laws.



## TRANSCRIPT

[58] MS MILES: That is fine.

THE COURT: Does someone want to get the easel?

MS. MILES: Q. Can you show us the general area when we refer to the high country or the Chimney Rock-Doctor Area. Show the court where on the map we're speaking.

A. Yes, I am familiar with that, this area, because my grandmother was a Pomo Indian Doctor, and she went through very much before she could get the power from the great creator.

Here is Doctor Rock, and this is where they start out their dancing, and Elk Valley is where they come first to meditate, to clean themselves, clean their hearts, so that they can thank the great spirit, the great spirit will be pleased before they can even talk to him.

THE COURT: Did you say something about a Doctor Rock? Did you say that?

THE WITNESS: Yes.

THE COURT: Is that different than Chimney Rock?

THE WITNESS: Yes, it is. Chimney Rock is above Elk Valley.

THE COURT: Okay, go right ahead.

THE WITNESS: Then they go down to the Doctor Rock and do their dancing, and they don't get involved with other voices but the great spirit, and from there, they are told what to do before they begin or are granted the power.

\* \* \* \* \*

[64] THE COURT: Please proceed.

MS MILES: Q. Mr. James, you testified before the break that you have used the high country in your religion and that you communicated with the spirit through the high country.

Can you tell us why that area is important to your communicating with the spirit?

A. It was given to us. This is where we meet with the great spirit, that area, and that's why we all get a call to go there.

Q. Is it important in your religious beliefs, in your practices, that the high country remain as it?

A. It is very important.

Q. Why?

A. To be left alone as it is.

Q. Why is it important to you in practicing your beliefs?

A. Let me put it this way: If we took a bulldozer and run it through the the white man's church, it is like if they went in there and felled the trees, it would be like pulling the lumber and everything off of the walls, and then destroy their Bible—it is the same as that.

MS MILES: Thank you. I have no other questions, your honor.

THE COURT: You may cross-examine, that is unless

\* \* \* \* \*

[75] Q. Thank you, Mr. Peters. I have on the slide projector a slide presentation which has been admitted into evidence as plaintiffs' Exhibit 1. Before showing it, could you very briefly describe the presentation and how it came to be made.

A. The presentation is a collection of slides taken of the area of Indian people, and it depicts the significance of the area as related to an effort of regenerating Indian traditions and Indian customs in northern California.

It was prepared primarily to provide an orientation to the court as to what we're talking about, also providing an understanding, a better understanding on the part of the defendants, who may not, at this point, realize the significance of the area.

In that regard, if we can have the screen set for the defendants to see it as well, it may be a better arrangement.

THE COURT: The defendants can move. You probably have it set up and focused now. We can dim the lighting, you don't need to dim the lights too much.

(Showing of slides)

THE WITNESS: The Yurok, Karok and Tolowa Indian Tribes live in the northwestern corner of California. These tribes share the use of a very special religious area. That area is located in the southern portion of the Siskiyou [76] Mountains, and referred to by the Indian people as the "high country."

Doctor Rock, Chimney Rock, Peak 8 and Little Medicine Mountain are located within this religious area and are some of the more sacred places within the high country. They have been used throughout the years by Indian people who go there to pray for special purposes of special powers, or medicine.

The high country was placed there by the creator as a place where Indian people could seek religious power.

THE COURT: Could you stop that for a moment? Are you familiar with all of the scenes that are shown here?

THE WITNESS: Yes, I am.

THE COURT: Do you know whether or not all of these, all of them are representations of the terrain of land and everything else within the area that you indicated on the map there? They're all located within that oblong?

THE WITNESS: Yes, they are.

THE COURT: You're sure of that?

THE WITNESS: Again, without looking —

THE COURT: But approximately?

THE WITNESS: Approximately, they do, yes, they do.

THE COURT: Thank you, you may proceed.

THE WITNESS: The high country was placed there by the creator as a place where Indian people could seek [77] religious power. This area is our church: cannot be moved or disturbed in any way.

Any adverse changes in the high country will have a direct impact on the practice of our religious beliefs. The high country — Doctor Rock, Chimney Rock — is essential to our religious beliefs, and serves as the very core of our cultural identity.

The high country is used by Indian people who have dedicated years for special training and preparation.

Today, one of the individuals who uses the high country is Charlie Thom, a Karok Indian. Charlie Tom assists in training young Indian people. He prepares them for religious use of the high country. Many people who are not familiar with our religious ways think that Indian people and Indian religions only existed in years gone by. However, our elders continue to maintain and preserve our religious beliefs and spiritual ways.

Indian religions continue to exist today; increasing members of our young people are taking a more active role in the traditions and ceremonies of our people.

These traditions are passed down from generation to generation. With these religious beliefs and traditional customs, we look proudly into the future.

Kateamean on the Klamath River, near Mount Auich, is the center of the Karok World. The Karok people continue

\* \* \* \* \*

[79] enter the Klamath River.

Indian people depend on salmon for their basic survival. Salmon is also an integral part of the cultures of Northwestern California Indian Tribes. Salmon is shared among our people at most religious ceremonies. Therefore, an adverse impact to the fish habitat will not only affect the ability for salmon to survive, but will also adversely impact our ability to continue our traditions and customs.

THE COURT: You may proceed. Go ahead.

MS MILES: Q. Mr. Peters, do you use this area for religious purposes yourself?

A. Yes, I do.

Q. Can you explain to the court how you use this area?

A. I have been involved with the area for many years. As a child, I used to spend days camping with relatives in the area.

During those times, I was made familiar with the different areas of prayer seats, again, prayer is an awkward word to use in that reference, but prayer seats used for engaging in emotional, spiritual exchange with the creator.

My use of the area is primarily meditation, a place where I go to renew myself and my identity as an Indian person, renew my commitment to a creator or spirit.

Q. What qualities of the area are important to your ability to do these practices and follow through as you have [80] just described?

A. The qualities have been articulated in many documents already.

I think the primary quality is the pristine nature, the solitude of the area, the quietness of the area. That will be disrupted and destroyed with the proposed road development and timber harvesting plan.

Q. Are you familiar with existing jeep road in the Chimney Rock area that we have described?

A. Yes, I am.

Q. Does that affect your religious practices now?

THE COURT: Would you read the last question before the pending one, Mr. Reporter?

(Record Read)

THE COURT: I'm not clear as to what road reference is being made by your question. Are you referring to the road that presently traverses the 6.02 mile gap, is that what you mean?

MS MILES: Yes, Your Honor.

THE COURT: You understand the question?

THE WITNESS: Yes, I do.

THE COURT: And your response is what?

THE WITNESS: Yes, I am familiar with the road.

MS MILES: Q. And how does that road affect your religious practices that you have been describing?

[81] A. The road is a dirt road, and it connects, it goes through the area. The use of the area disturbs the quiet and the solitude of the area, though the road itself, as discussed earlier in previous hearings, may not have a direct adverse effect. The use of the road has a significant and destructive impact on the ability to engage or maintain engagement with the spiritual world.

Q. How would the completion of this new road as proposed be different than what you have just described?

A. The new road would provide significantly greater numbers of people using the area.

It is also the basis of whether further development will occur. The Blue Creek management plan specifically, after the management plan has been completed, I don't know what is in store for the area in generations to come. You know, in Indian customs generally, a decision of this magnitude is not only made for the current generation but is made for six or seven generations to come.

The management plan may produce some immediate jobs and stimulate some economies today, but it will have a destructing effect on generations to come, and that is the point of the slide presentation, to show that cultures are not dying, they are coming back stronger.

Q. Could you explain this "cultures are coming back stronger" revival of what you were speaking of then?

\* \* \* \* \*

[83] They were also sons and daughters of people who were herded onto reservations and rancherias in the state of California, and exposed to diseases and exposed to more murders—so Indian cultures in the past few generations have been weakened.



Indian people now are removed from that. We can stand up more aggressively and say "We want to continue our identity." And large numbers of people are doing that now, not only here, but throughout the nation. There is a revitalization of Indians that is coming, and it is growing stronger each year.

Q. Would completion of the road as proposed affect this revitalization that you just described for the court?

A. As I have indicated earlier, that area does not belong to us. That area belongs to a spiritual world that was put there by a creator or a spirit for Indian people to use. It is the core, It is the very center of our cultural identity. It is where we get the power that makes our religious ceremonies significant. Where we get personal power that reaffirms our Indianness and our way of life.

To disrupt it and to destroy it, as the Forest Service is proposing to do, would definitely have an impact on the regeneration of Indian people. Currently it would totally destroy and hope of our grandchildren from knowing what that area has for them.

\* \* \* \* \*

[97] that you have adduced that the new proposed road would be further from Chimney Rock than the existing dirt road?

MR. HAMBLIN: That is correct.

THE COURT: Okay. How much further?

MR. HAMBLIN: My understanding, to answer the witness' question and then I will proceed from there, is that the existing unpaved road is a quarter mile, roughly from Chimney Rock, and the new proposed route will be approximately almost a mile further down the hill.

THE WITNESS: It would still dissect the area, right?

MR. HAMBLIN: It will still connect the two parts.

THE WITNESS: But dissecting the religious area, going directly between Chimney Rock and Doctor Rock?

MR. HAMBLIN: As the present road does. It does dissect it at the present time.

THE WITNESS: Does the new road also dissect it, that is the point I'm trying to get?

MR. HAMBLIN: It will replace the existing road.

THE COURT: I don't know, it might help the witness and help the court, I take it the answer to the witness' question, while you're not testifying in the case, the answer to the question is it would dissect, the new road?

MR. HAMBLIN: It presently dissects it, this road will be paved, and it will continue to dissect the area.

\* \* \* \* \*

[112] be 500.

Q. Thank you. How many of these people that you have just described participate in ceremonies of which you have spoken before, directly participate?

A. Now, there are ceremonies at different locations. When a ceremony is conducted at Clear Creek or Pettiman in Pedrok Country, the numbers will vary from ceremony to ceremony, but at the far end of it, I would say three to four hundred people.

Q. And is there a relationship between these ceremonies and the use of the high country?

A. Definitely, a direct relationship to the ceremonies. Maybe we need to look at the ceremonies, also, and how they would affect those people.

First of all, the White Deer Skin Dance, as performed, or Pickyouwish in Pedrok Country, they are World Renewal Ceremonies, and most of the time when people think of world renewal, the general understanding, the image or the concept is making the physical world over again.

The ceremonies do, they pray and do that deed, but also they make a spiritual world over again, a spiritual bond that holds tribal people together.

So when we are performing a Pickyouwish or Deer Skin Dance, it has an impact on the whole tribe, but even more extensive than that, we're doing it for everybody in [113] the world, not only tribal people, but non-tribal and non-Indian people as well.

Q. So the Indian people that you describe that directly participate, they would be harmed by the construction in the Chimney Rock-Doctor Rock area?

A. They would experience the most direct and significant harm from the proposed road completion and timber harvesting.

The other people who are believers in it would be impacted, also.

Q. How is that?

A. The Power of receiving places we're talking about, Doctor Rock, Chimney Rock, Peak-8, Medicine Mountain—people go there and receive a spiritualness that they come back down to the valleys and engage in ceremonies, and we talked of ceremonies earlier as a group effort, as a group prayer or a collective engagement with a spiritual world.

That significance of those ceremonies and that engagement that we talked about would be impacted significantly by not being able to have that area to receive power from.

Q. That would be the 4500, roughly, believers that you have described?

A. That is correct.

MS MILES: I have no other questions, your honor.

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[119] THE WITNESS: The significance of those people?

THE COURT: To those people.

THE WITNESS: Are their well-being as Indian people.

THE COURT: Yes.

THE WITNESS: Maintaining a belief in religious tradition.

THE COURT: Are you saying that if the road is completed, they would lose that belief in that tradition?

THE WITNESS: I'm saying the ability for chosen people, either chosen spiritually to use that area to receive power, to return back to their communities participating in ceremonies and individual healing practices, that those people, those other 4500 people, they would have their traditions seriously impacted without having that area to call upon for power or to receive power.

THE COURT: I'm not sure I understand, and I'm trying to get what is in your mind.

THE WITNESS: Okay.

THE COURT: Let me ask a further question that may be helpful: are you saying that the adverse impact on the 4500 would be that the thirty or forty who actually go there, and the eighty to one hundred who have actually been there, would not be in a position to bring back to the 4500 something that is significant to the religious [120] beliefs of the 4500? Is that what you're saying?

THE WITNESS: That is correct.

THE COURT: All right, thank you. I have no further questions.

Before final cross-examination, if counsel wants to ask further questions, does anyone on the plaintiffs' side wish to ask further questions?

MS WALZ: I have none.

MR. SHERWOOD: No.

THE COURT: Do you want to ask any questions?

MR. HAMBLIN: Just a couple.

#### RECROSS-EXAMINATION

BY MR. HAMBLIN:

Q. MR. PETERS, You mentioned a moment ago, there is usually between three—

THE COURT: I think I have another questions I would like to ask.

MR. HAMBLIN: Yes.

THE COURT: Are there any other sites in the State of California or outside, for that matter, which have a religious significance of a quality similar to that to the areas in question?

THE WITNESS: Not to my knowledge.

THE COURT: So are you saying that the only really sacred areas for the Indians to whom you refer, the only

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[122] A. The Hoopa Tribe.

THE COURT: They were not part of the 4500 group?

THE WITNESS: Definitely not.

This maybe depicts the geographical traditional areas of the tribal groups.

THE COURT: Not to cut you off, but that really has no role in this.

MR. HAMBLIN: Q. You mentioned earlier that a typical ceremony, there might be three to four hundred attending at a given time. Is it at that ceremony that they participate in, I think you described it as the White Deer Skin Dance or Brush Dance or Kick Dance?

A. The Kick Dance primarily was used in a different sense. It was to prepare people for medicine to make the journey we talk about at a lower level.

The ceremonies I referred to were the White Deer Skin Dance, The Jump Dance, and The Brush Dance. Each of them have significant meanings in and of themselves.

Q. And these are, I think you said, on the Klamath River or generally along the Klamath River, about thirty miles south of Chimney Rock?

A. Yes.

Q. Now, when that ceremony is being performed, it is at that time that a medicine person then goes up into the

high country, up to the Chimney Rock area to get the power [123] and then come back down?

A. I imagine he could, or she could. It depends on the calling and it depends on how much power you already have to participate in those. If you're comfortable with what you have, then you can participate.

Q. I see. But how many would you estimate go up in a typical ceremonial gathering of 300 or 400 on the river, how many of those would go up into the Chimney Road area, maybe one or two?

A. Possibly, possibly as many as I have indicated, depending on how many Chilula, how many Yuroks and Karoks participate—it may be all are there at one time, it may be one or two people that are there.

Q. These ceremonies you refer to on the river, could you give an estimate, do they occur once a year, twice a year, any estimate that you feel is reasonable?

A. Once or twice a year, depending on the ceremony. The Brush Dance generally two to three times a year, the pickyouwish is generally every year, Deer Skin Dance every other year, Jump Dance every other year.

Q. Is that primarily the time that people with the power would go up to prepare for those ceremonies, they go up to the Chimney Rock area?

A. Not necessarily.

Q. But it would be one of the times?

[124] A. It could be one of the times, yes.

Q. And when they go up there, do you have any estimate how long would they be in the Chimney Rock area or Doctor Rock? Do you know the length of number of days?

A. Until they receive the power. The common reference to the process is a ten-day fasting, ten days of abstaining, ten days of preparation before you get the power, and when that happens, you lose control, you dance, you sing, so if that comes earlier in that process, then it does not take as long.



Q. So a person would be present up there anywhere from one or two to ten days?

A. That is right.

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[185] These reviews came in and they recommended additional work, a new study to overcome the earlier deficiencies and I supported these recommendations and I recommended additionally to the Forest Service that there be a major study design run to see that the various policies of the National Historic Preservation Act, particularly in terms of identifying and evaluating if there were significant sites out there, whether there were to be adverse affects from them. I recommended that be carried out.

They accepted the recommendation and we advertised, solicited proposals. We received them and the end result was the Theodoratus study.

I then served as contracting officer representative for the Forest Service with that project. It was my responsibility to see that the contract specifications were properly carried out, so I regularly went out into the field with the archeologist, went to Doctor Rock, Chimney Rock, watched them, observed them doing their work.

I went out into the field with Dr. Theodoratus, watched her talking with various Indians, observed the history component of it and watched the whole project unfolding.

Then in 1979, before I left, Dr. Theodoratus submitted the report and I evaluated it and found that it did indeed meet the contract specifications and I wrote an [186] evaluation stating that and also agreeing with the findings that she presented and her recommendations.

Q. Based on all of this information that you have with regards to the cultural resource properties, be it the Theodoratus or other different studies in your own field, do you have an opinion with regard to the impact that the Chimney Rock section of the G-O road will have on those cultural properties?

A. Yes, I agree with her findings and if I might add, I also agree with later findings that the Forest Service itself has come up with, that there will be adverse visual and audible affects upon the sacred idiological and spiritual qualities of the high country.

There was a Forest Service document, a key document prepared after I left. I believe it was prepared by Mr. Wilson, called "The Preliminary Case Report." This is an absolutely essential document that has to be prepared in order to meet the National Historic Preservation procedures when you have a situation of adverse affect.

This document was prepared in 1980, October of 1980 and then later in March of 1981 a supplement was prepared and submitted to the advisory counsel.

In it, the Forest Service very clearly and unequivocally states that there will be adverse audible and visual affects to the sacred qualities of the district and [187] they also very clearly state that there are no ways of mitigating those affects.

They therefore recommend to the advisory council that a memorandum of agreement be developed, recognizing that and allowing them to proceed because they felt it was in the public interest and I agree with that document.

THE COURT: Just a minute. If I understand what you just said, there is no question that what you are talking about the road, are you?

THE WITNESS: Yes, sir.

THE COURT: And the completion of the six miles and consequences of that completion will have an adverse impact upon the religious practices in the area around Doctor Rock and particularly Chimney Rock; is that right?

THE WITNESS: Yes, sir. The Forest Service recognizes that.

THE COURT: Yes, but as I understood your testimony, recognizing that, the Forest Service determined

the public interest was paramount and therefore the road ought to be completed notwithstanding those consequences?

THE WITNESS: Yes, sir.

THE COURT: That's what you said.

THE WITNESS: They recommended that to the advisory council, but the advisory council found differently.

THE COURT: Yes.

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[203] and I don't understand the answer. They will both be stricken.

MR. HAMBLIN: Q. Are there some physical sites and properties up there that — such as Chimney Rock —

A. Yes, sir.

Q. And as an anthropologist, you consider that as a physical site and as a location?

A. Yes, sir.

Q. And the existing road that goes up there at the present time is about what, a quarter mile from the Chimney Rock?

A. Yes.

Q. The selection of alternative D-4, as you probably are aware, having walked it, is about removed one mile away from Chimney, is that correct?

A. Yes, sir.

Q. Now, would that be, in your opinion, a mitigation to some extent by moving the road a mile away from the physical property Chimney Rock?

A. It does not mitigate the visual and audible effects upon Chimney Rock.

Q. Well then, would it make no difference where they moved the road to be constructed from Chimney Rock? I understand it makes no difference; it still would have an effect, but —

A. It would make no difference as to any of those [204] nine alternative routes, whether it's a quarter of a

mile, a mile, two miles. They'd have to move it fifteen, twenty miles away.

Q. Well now, if they moved the road closer, where it is now and paved it, right up there in the existing road and paved that, would that have more adverse impact on Chimney Rock than it would be to move it a mile away?

A. It is my opinion that it would not.

THE COURT: Why not?

THE WITNESS: Because the nature of the effects doesn't matter whether it is a quarter of a mile or a mile or two miles.

THE COURT: What are the effects?

THE WITNESS: The effects are that the presence of the road, the actual presence of the road, the visual conditions that it introduces in and of itself, as well as the trucks going along it and the noise of constructing it and using it adversely affect the sanctity of the whole area.

THE COURT: Are we talking about physical? I think — would not so far as noise is concerned, the passing vehicles — wouldn't the impact at the point of Chimney Rock be less, wouldn't the decibels be less if the traffic were a mile away rather than a quarter of a mile away?

THE WITNESS: It is a fact, I guess, that according

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[227] Q. Where is Mettah located? Is it in the reservation?

A. Yes.

Q. Where do you live now?

A. At Mettah.

Q. How were you raised?

A. I was raised as a full-blooded Indian baby should be raised and grew up as one.

Q. Who were you raised by?

A. My grandparents. I was raised by my grandparents, so I was taught by the elders about our tradition, about our church, about our people.

I was fortunate. Today I'll say "fortunate." Many times I thought it was not fortunate that I was born to four of the biggest houses in the Yurok Strip where the famous dances had come up, the White Deerskin Dance, the Jump Dance and the Brush Dance and many other games, and how the Indians had to use the high country to go and pray so that when they come back to the lowlands, that we can share with one another.

My place has been that I have a lot of those relics that I share with my neighbors, the Hoopas, the Karok's and my own people to uphold and to see that our religion go on as it has for thousands of years past.

Q. When you say you share these items, what do you mean you are "sharing them"?

[228] A. Well, down through the years, due to the fact that there were soldiers and people who came through and destroyed, burned, killed, a lot of the relics were burned or taken.

So now, a few of us are left in the three tribes and we take and share. So and so's got a Brush Dance. Their time comes, their time to dance, we give them so many piece relics they need and the other people do the same so that the dance can be performed the true way as it has been for thousands of years.

Q. Do you hold a position within your people?

A. Yes.

Q. That's different from others?

A. Yes, I was taught — I'm not an Indian doctor, but I was taught how the Indian doctors do, because three of my grandmothers, one from Bluff Creek, one from Saa' and one of them from Orick was an Indian doctor.

But then Indian doctors that train, they are just like it is of the medical doctor today. They fill so many different categories. Some is for brains and some is for bones and some of them for other ailments.

Years ago, we use our herbs from the high country where God had left a piece of land dedicated to be the use

of the tribes, to go there and pray like they say Mecca, or different places through the world where the people go by the thousands.

[229] We were only allowed to take those that have passed the test and proven, for they come back to the lowlands and then we pray to our people, asking for help and these dances were not performed for the beauty; they were performed asking that we'll have plenty to eat, we would have plenty of game, for conservation was the mainstay of our livelihood and through these canyons — and we always wanted to protect the top of the mountain, because anyone that knows the Klamath, for the first two miles, it's just rock, stray bluffs and cliffs.

So beyond that, God left us a strip about ten miles wide where the Karoks can come and gather their grain, their seeds and things and once I heard they say, "Do you hunt at Doctor Rock?"

No, Ma'am, we do not hunt at Doctor Rock. It's a sacred place. Nothing is killed at Doctor Rock and Chimney Rock. Chimney Rock is a man's place to go have — to prove that they can stand anything that comes along and be brave, to face the world.

So the people can have the knowledge and carry on and we, older people watch the younger boys — they are raised by the old men and taught. The young girls are separated and they are taught and that was a thing was left to me by these great houses and these great rulers.

We had no chief. We had head men and we all got [230] together and anything that come up, we would come together and talk it over and if there was anything that needed help, then we would see that they all got help, whether that was something that had happened, why they didn't have any food or whether there was sickness. These doctors would go there — not everybody — and it's the same way, speaking of how we had lived.

Your Honor, may I proceed?



THE COURT: Sure.

THE WITNESS: How we had lived, we the people from Bluff Creek, which is no more now—that's where we had our Boat Dance or our White Deerskin Dance.

Unbeknownst, unknown to me and my people, we didn't know that the BIA, even though we had a treaty which we didn't know later that it was not ratified—we gave all we had promised, way beyond the mountains for them and for the land that we were to have in there, to keep our homes.

In that way we lost everything and now we are standing on the last peak, Doctor Rock, Chimney Rock. My neighbors have lost a lot of their ceremonial grounds due to mismanagement of the people, not because they were cruel, but because they didn't understand.

THE COURT: Not because they were what?

THE WITNESS: They are not cruel.

THE COURT: Cruel?

[231] THE WITNESS: Or unkind. They just did not understand.

THE COURT: Who was it that didn't understand?

THE WITNESS: The new people that came into the Indian country.

THE COURT: By the "new people," who do you mean?

THE WITNESS: The white people.

THE COURT: The white people? Well, you are generous in saying they weren't cruel.

All right, go ahead.

THE WITNESS: So, today I am here, the last place we have. I'm looking back. The Tolewah Tribe, which is a great nation at one time, their villages was in the town or the city of Crescent City, Smith River and all through there. They have nothing of their ceremonial grounds, but many of them go to the high country where they have for thousands of years and prayed where they were told to go, Summit Valley.

The Karoks, they come over the mountains. There is trails there today and we could show it to you, where those trials are. They are secret to everybody else. There are just a few who know where they are, which lead to the high country, Doctor Rock, Chimney Rock, which is a sacred place.

Only a few people that are left in these great

\* \* \* \* \*

[239] A. For the Brush Dance.

Q. And someone has to go up to the high country to—

A. Call a spirit from the high country.

Q. Will constructing the road that the Forest Service has planned affect your ability to carry on this ceremony you have just described?

A. Yes, it will. The high country is like our church. In building a road through our church would be really destructive in my frame of mind. I don't know about anybody else, but that's what my belief is. That's our belief, our Indian belief.

Q. Do you use—

THE COURT: Mr. Jones, why would it be destructive?

THE WITNESS: They have to pray. When the medicine lady go out there to pray, they stand on these rocks. They call them Doctor Rock and Chimney Rock and they meditate. I mean the forest is there looking out. They talk to the trees and rocks, whatever is out there.

Our people talk in their language to them and if it's all logged off and all bald there, they can't meditate at all. They have nothing to talk to and after they get through praying, their answer comes from the mountain. The medicine lady that goes there or man will see a light or a phantom or whatever they see and then their prayers are answered.

\* \* \* \* \*

[247] MS. MILES: Q. Thank you, your Honor.

Among the traditional beliefs, the people we heard testify, who uses the high country?

A. Well, the whole question of the use of the high country gets into a very tricky matter. Not only for Yurok, but for many native Americans because we, especially in the high country manifestations where they occur, you are dealing with essentially an area that is secret, and to get into the details of that secret behavior, many of the followers of that religious tradition feel even discussion of the area is an infringement upon their religious belief.

So that I have a severe difficulty in dealing in specifics, and yet as I was trained by those who were the religious philosophers, they have told me it is appropriate when it is absolutely necessary—under the traditional law and religion, it is appropriate to discuss certain amounts of detail and so where I can say certain things where I have talked to people who have been active users, who have been users in the past of the high country—for instance, I would give a classification of the types of people that I know have used the high country. Let me break it into male and female to start with, because this is one of the—one of the first classifications and one that the court has already heard, although I would alert the court, too, it is really the distinction between medicine people and other

\* \* \* \* \*

[259] proposes in the light of the way things are now, would constitute an interference with the religious beliefs and religion—exercise of religion on the part of a group of Indians.

I don't know how to state it more clearly than that. It can be read back to you and I want to know what evidence you can point to in the record so far that is contrary to that.

MR. HAMBLIN: Well, up to that point, no, your Honor. I mean not until the government puts its case on.

No, right now the testimony says that this is the straw that broke the camel's back, so to speak.

THE COURT: Fair enough. In terms of religious freedom?

MR. HAMBLIN: Yes, up until now they have a religious freedom. If it were that simple, your Honor. I must say, when you say, "the plan," the plan which is the management plan does not call for the harvest of trees. It is a master plan. If and when they first go out to cut a tree, your honor, they then have to do an environmental assessment, and that's where these eleven sites come into.

THE COURT: All right, perhaps we can segment it and that is supposing we leave out—mark this, please.

Is there any evidence before the court that contradicts testimony showing that completion of the road [260] would interfere with the first amendment rights of a number of Indians?

MR. HAMBLIN: That's what the testimony supports, yes, your Honor.

THE COURT: And there is no contrary testimony?

MR. HAMBLIN: Not as yet, no.

THE COURT: Do you anticipate that you will produce contrary testimony, or that you might be able to raise some question on that by cross-examination?

MR. HAMBLIN: Well, your Honor, I can't—no matter—there is no amount of testimony—

THE COURT: All I want to do is shorten it.

MR. HAMBLIN: I want to shorten it, too.

THE COURT: I have no quarrel with your position. I can understand your hesitancy. You have a responsibility to protect the rights of your client and haven't any quarrel with it. I was just expressing to you, so that all sides will know, that as of now I am inclined very strongly toward the idea that so far as first amendment rights are concerned, that what the government wants to do is a violation of those rights as to a substantial number—by "sub-

stantial" I mean at least 100 and probably more, many more in an indirect fashion, but interference with their religious freedom, with their first amendment rights and if I'm correct in that, unless there is contrary evidence, and

\* \* \* \* \*

[276] But listen to the question and make sure you understand it. If you don't understand it, say so. If you do understand it and don't know the answer, say so. If you do understand it, answer the question and no more. Don't volunteer anything. Don't say anything more than necessary.

Read the question, please.

(Whereupon, the record was read by the reporter.)

THE WITNESS: No.

THE COURT: Good answer.

MR. HAMBLIN: Q. Since March 10th, 1975, have you made any other further investigation of the Blue Creek area?

A. Yes.

Q. And what investigation is that?

A. I have since then interviewed several persons who have been or are active users of the high country area, have collected a great deal of additional detailed information which I did not then command knowledge about the use of the high country.

Indeed, the willingness of native American and non-native American users to talk about the high country has sharply increased in the period since '75. So I feel as a product of my interviewing, that I no longer would raise the question which I felt had to be raised to Wiley. I am at this point quite firmly convinced in any comparative [277] religion background that I have, that the completion of the G-O road would be a very significant infringement upon the religious rights, the religious freedoms of a significant portion of the native American population and certainly a significant percentage of the population in that small part of California.

THE COURT: Wait just a minute. Take a look at page 309. Have you got it there?

THE WITNESS: No, I'm sorry. No one has provided me with a copy.

MS. MILES: Mr. Hamblin, do you have other copies of that document?

THE COURT: Just a minute. You can stay there there if you want. Do you have 309? Read the first paragraph under "Proposed Eight-Mile Blue Creek Project."

MR. HAMBLIN: Starting with "the inappropriate-ness"?

THE COURT: Do you see number 2 under that?

MR. HAMBLIN: Yes.

THE COURT: Do you see number 4 under that?

THE WITNESS: Uh-huh.

THE COURT: Wasn't that consistent with the views you hold today?

THE WITNESS: Yes, sure, those are consistent.

THE COURT: All right.

THE WITNESS: It depends upon what level of summary

\* \* \* \* \*

[320] meditating, and all of a sudden you hear a bunch of chain saws going on. That isn't so good for meditation, I wouldn't think, and then maybe you're just all of a sudden looking up and there is a helicopter dragging a log along the grade there. They can go around it. There's plenty of room there, but not on this side because this is getting to be eroded on the Blue Creek side.

They can go around on the other side there. There is plenty of room. There is plenty of timber for them there.

MS. WALZ: Thank you, Mrs. Shaugnessy. I have no further questions.

THE COURT: Okay.

THE WITNESS: Okay.

MR. SHERWOOD: No questions.



MS. MILES: I have no questions.

THE COURT: Do you wish to cross-examine?

\* \* \* \* \*

[342] 112 days in the hospital and went home and spent months in traction, and the doctor said I would never walk again, but I am walking and I ain't cutting no more trees.

THE COURT: Well, did you hear the testimony of other witnesses? You have been in court a while here.

THE WITNESS: Just today.

THE COURT: You heard at least one other witness, perhaps two or three say that the road—completion of the road would interfere with the use of Chimney Rock, for example, for religious purposes, because of the noise of traffic. Did you hear that?

THE WITNESS: Yes, I did.

THE COURT: Did you agree with that?

THE WITNESS: I agree to one extent.

THE COURT: To what extent? What do you mean by that?

THE WITNESS: Well, it's like one of the witnesses said, did you ever sit on the mountain and listen to the noise in the foreground?

THE COURT: Yes, but I take it then that what you are saying is that if you, for example, wanted to, in the practice of your religion, go up to that site and meditate and a road were completed and trucks and other vehicles went through, it would interfere with your meditation?

THE WITNESS: Yes, it would.

[343] THE COURT: In the practice of your religion; is that right?

THE WITNESS: Yes, it would.

THE COURT: Do you want to ask any further questions in light of my examination of the witness?

MR. HAMBLIN: No, your Honor.

THE COURT: All right, you may step down.

Counsel, I'm going to ask all of you attorneys to please be prepared to move along a little more rapidly in questioning and to eliminate unnecessary questions.

For example, I thought you'd be about a half hour with your witness. You were only about fifteen minutes. I think that you zeroed in on exactly what you wanted to get from the witness. It could have been done in ten minutes, and I'm going to ask that all counsel do what they can to shorten their examination by virtue of careful preparation.

I think that there is nothing more that I need to take up with counsel tonight. All right, we will be in recess in this case until tomorrow morning at 10:00 o'clock. 10:00 tomorrow morning.

(Whereupon, the proceedings were recessed to Wednesday, March 16, 1983 at 10:00 a.m. o'clock.)

Supreme Court of the United States

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No. 86-1013

RICHARD E. LYNG,  
SECRETARY OF AGRICULTURE, PETITIONER

v.

NORTHWEST INDIAN CEMETERY

---

ORDER ALLOWING CERTIORARI. *Filed May 4, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

# **PETITIONER'S BRIEF**



JUL 28 1987

No. 86-1013

JOHN R. ROBERTS, JR.

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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**RICHARD E. LYNCH,**  
**SECRETARY OF AGRICULTURE, ET AL., PETITIONERS**

v.

**NORTHWEST INDIAN CEMETERY**  
**PROTECTIVE ASSOCIATION, ET AL.**

---

**ON WRIT OF CERTIORARI TO**  
**THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

**BRIEF FOR THE PETITIONERS**

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500P

### **QUESTION PRESENTED**

Whether the government's decision to reconstruct the final six-mile segment of a 55-mile road located in a portion of a national forest that has religious significance for members of three Indian Tribes and its decision to permit logging within that same area of the forest violate the Tribe members' rights under the Free Exercise Clause of the First Amendment.

### PARTIES TO THE PROCEEDING

In addition to the petitioner listed in the caption, Dale Robertson, Chief of the United States Forest Service;\* Zane G. Smith, Jr., Regional Forester for Region Five, United States Forest Service; the United States Forest Service; and the United States of America were defendants in the district court and are petitioners in this Court. In addition to the respondent listed in the caption, the plaintiffs in the district court were Sierra Club, The Wilderness Society, California Trout, Siskiyou Mountains Resource Council, Redwood Region Audubon Society, Northcoast Environmental Center, Jimmie James, Sam Jones, Lowana Branter, Christopher H. Peters, Timothy McKay, John Amodio, and the State of California. All of these parties are respondents in this Court.

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\*R. Max Peterson, former Chief of the Forest Service, was named as a defendant in his official capacity. Mr. Peterson's successor as Chief of the Forest Service, Dale Robertson, is automatically substituted as a petitioner by operation of Rule 40.3 of the Rules of this Court.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1013

RICHARD E. LYNNG,  
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v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The decision of the court of appeals on rehearing (Pet. App. 1a-37a) is reported at 795 F.2d 688. The prior decision of the court of appeals (Pet. App. 38a-52a) is reported at 764 F.2d 581. The decision of the district court (Pet. App. 53a-91a) is reported at 565 F. Supp. 586. The prior decision of the district court denying respondents' motion for a preliminary injunction (Pet. App. 92a-102a) is reported at 552 F. Supp. 951.

## JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986. On October 9, 1986, Justice O'Connor issued an order extending the time for filing a petition for a writ of certiorari to and including November 19, 1986; on November 13, 1986, Justice O'Connor issued an order further extending the time for filing a petition to and in-

cluding December 19, 1986. The petition was filed on that date and was granted on May 4, 1987 (J.A. 281). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

### STATEMENT

This case concerns the limitations imposed by the Free Exercise Clause of the First Amendment upon the federal government's authority to manage the public lands. Specifically at issue is an area of approximately 25 square miles in the Six Rivers National Forest in northwestern California. This area is located in the northern section of the forest between the Smith and Klamath Rivers. Pet. App. 3a.<sup>1</sup> None of this land ever formed part of an Indian Reservation, and no Indian treaty imposes a trust duty upon the United States with respect to this land. Respondents have challenged the Forest Service's decision to construct the final six-mile section of a 55-mile paved road through the forest and its adoption of a management plan governing the harvesting of timber in this portion of the forest.

1. *The Indians' Religious Beliefs.* The land management decisions at issue in this case affect an area known to the Yurok, Karok, and Tolowa Indians as the "high country."<sup>2</sup> Since at least the early part of the nineteenth century

<sup>1</sup> The maps reproduced in the joint appendix portray the relevant area. See J.A. 215-216.

<sup>2</sup> Although the geographic extent of the high country is not defined with precision, the construction of the road and the implementation of the harvesting plan would clearly impact upon it. See J.A. 149-150 (discussing boundaries of the high country).

and continuing to the present, the high country has been considered sacred by these tribes and many of their religious beliefs and rituals have focused upon that area. Regular visits to the high country have played a critical part in the Indians' religious practice.<sup>3</sup>

One element of the Indians' religious beliefs is "a religious complex generally called World Renewal whose purpose is the stabilization and preservation of the earth from catastrophe and of mankind from disease" (J.A. 111). This goal is pursued through dances held at specified times and places (*id.* at 111-118), a necessary precursor of which "is the pre-dance preparatory medicine made by the medicine man at specific sites in the high country" (J.A. 113). The district court found that "[t]he religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community" (Pet. App. 58a).

The high country also is important in the acquisition of personal spiritual power by individual tribe members. Thus, it is believed that persons who have the ability to cure the sick derive their powers from the high country during sojourns of different types and durations. J.A. 120-128. According to the Indians' beliefs, the doctors draw their powers from pre-human woge-spirits who went to the mountains with the coming of humans to the earth. "The high places, then, are the focal source of curative power for those who live in Northwest California." *Id.* at 125. The high country is likewise important in tribe

<sup>3</sup> The following discussion of the Indians' religious beliefs is based largely upon a study commissioned by the Forest Service. See D. Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979). (Relevant portions of the study are reprinted at J.A. 110-197.) Testimony at trial by members of these tribes corroborated the study's description of the beliefs. See, e.g., J.A. 256-280.



members' acquisition of personal "medicine" for particular purposes other than curing the sick, such as obtaining good luck in singing, hunting, gambling, love, or other endeavors. J.A. 128-137.

A period of preparation generally precedes a visit to the high country for spiritual purposes. The individual "enters the high country to make medicine at a walk or a run"; he must select the trail appropriate for both the type of "medicine" that he seeks and his own abilities. J.A. 133-134. The individual also performs rituals at specific sites in the high country, with the particular site depending upon both the purpose of his visit and the individual's prior religious experiences. "Individuals progressively use sites of increasing power and this progression is a necessary part of religious growth. Experience at the lower levels of medicine is a prerequisite for attainment of power at the high levels" (J.A. 181). Sites for religious rituals include Chimney Rock, Doctor Rock, and Peak 8, all of which are rock outcroppings located at relatively high altitudes. J.A. 111, 123, 133; see also *id.* at 216 (map), 147-178 (discussing particular sites).

According to the Indians' beliefs, the religious nature of a particular site rests upon more than the physical characteristics of the immediate surroundings. "The quality of silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of that particular site" (J.A. 148). Accordingly, "successful use of the high country is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence and an undisturbed natural setting." *Id.* at 181; see also Pet. App. 9a (footnote omitted) (the "unitary pristine nature of the high country is essential to \* \* \* religious use"), *id.* at 58a (emotional and spiritual exchange with the creator "is made possible by the solitude, quietness, and pristine environment found in the high country").

## 2. *The Proposed Administrative Actions.*

a. In the 1930s, the United States Forest Service upgraded the routes through the northern portion of the Six Rivers National Forest that had been used by miners and other travelers during the previous century, converting those routes into more formal trails and low-standard roads. With the growth of the timber industry in the 1950s and 1960s, and even more urgently in 1978 when Congress indicated its concern about the adverse impact upon the economies of Del Norte and Humboldt Counties from the expansion of Redwood National Park (see Pub. L. No. 95-250, § 102(a), 92 Stat. 166), the Forest Service recognized the need for an improved road network. It therefore began to upgrade a series of unpaved roads connecting the towns of Gasquet and Orleans. This project, termed the "G-O" (Gasquet to Orleans) road, totals 75 miles in length. The northern 20 miles of the road are located on non-federal land and maintained by Del Norte County; the remaining 55 miles are located within Six Rivers National Forest. See J.A. 216 (map).

The basic purpose of the G-O road is to provide a route for hauling the large amount of timber that may be harvested from nearby national forest lands. The upgraded road is designed to enhance competition among timber mills by increasing the number of mills accessible from the national forest lands. The upgraded road also enhances the public's access to this and other national forests, thereby increasing recreational opportunities. Finally, the improved road will allow for more efficient maintenance and fire control. See J.A. 95, 100-101, 103, 220-222; Tr. 1258-1259; 1332-1335. The Forest Service informs us that it has spent approximately \$22 million to upgrade 49 of the 55 miles of the G-O road that are located on federal land. A six-mile portion of the road sandwiched between the upgraded segments—the Chimney Rock section—is all that remains unpaved.

In 1977, the Forest Service issued a draft environmental impact statement (EIS) discussing alternative proposals for upgrading the Chimney Rock section of the G-O road. The Advisory Council on Historic Preservation responded to the draft EIS by requesting information as to whether sites within the area were eligible for inclusion in the National Register of Historic Places. Pet. App. 4a, 55a, 85a. The Forest Service commissioned a comprehensive study of Indian cultural and religious sites in the Chimney Rock area, which was prepared by Dr. Dorothea Theodoratus and completed in 1979. See *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* [hereinafter *Theodoratus Report*].

The 423-page report contains a comprehensive ethnographic study of the Indians' culture with specific emphasis on religious beliefs and practices; the report also surveys the area's archeological sites. After considering the report, the Forest Service asked the keeper of the National Register of Historic Places to add to the register a 17,500-acre district containing areas of spiritual value to the Yurok, Karok, and Tolowa Indians. See generally 16 U.S.C. 470a. A 13,500-acre district was included in the register. Pet. App. 85a.

On March 2, 1982, the Forest Service issued a final EIS addressing the proposed reconstruction of the Chimney Rock section of the G-O road (Pet. App. 56a). The regional forester issued a decision on the same date selecting one of the alternative routes for the reconstruction of this section of the road, and rejecting the alternative of not upgrading the Chimney Rock section and leaving the G-O road incomplete (see J.A. 100-105).<sup>4</sup> The forester

<sup>4</sup> The regional forester noted that "[p]ublic interest was expressed by a favorable ballot in Del Norte County in June 1980 in support of the G-O Road. Plans for completion of the road have been known for over 20 years and construction of the first segments started in 1963" (J.A. 103). Accordingly, "[a] decision not to reconstruct the existing

observed that "[t]he multiple-use benefits and opportunities provided by the G-O Road are very significant to the development of the timber and recreation resources and to the economies of Del Norte and Humboldt counties" (J.A. 103).

The forester stated that the alternative selected is "the farthest removed from contemporary spiritual sites; thus, the adverse audible intrusions associated with the road would be less than all other alternatives" (J.A. 102).<sup>5</sup> He also stated that "[a]ccess to the historic sites and areas of religious practice is not being deprived. Some native people may feel access is enhanced. Individual sites are known and will not be disturbed. Mitigation measures will reduce audio and visual effects. Native people will not have exclusive use within the protective areas, but the natural environment will remain undisturbed. New roads and trails will not be permitted in these areas" (*id.* at 104).<sup>6</sup> The Forest Service authorized the construction of the Chimney Rock road project in July 1982. See J.A. 91-99.

b. At the same time that the Forest Service was considering proposals for upgrading the Chimney Rock section of the G-O road, it was developing a multiple-use management plan, and an accompanying environmental

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road \* \* \* would deprive the general public of many benefits and unnecessarily limit their use of the area" (*id.* at 104).

<sup>5</sup> The selected route was the farthest from Chimney Rock. Gov't Exh. G at 52-53.

<sup>6</sup> The regional forester also noted that "[t]he effect [of the reconstructed road] on archaeological sites would be indirect in nature. There would be no ground disturbing activities near archaeological properties. Being lower on the slope, there would be fewer adverse visual impacts" (J.A. 102). The regional forester acknowledged that the Chimney Rock section of the G-O road would traverse the district proposed by the Forest Service for inclusion in the National Register of Historic Places. He concluded that the "[e]ffects of the road on the District have been mitigated" by the road location and other ameliorative measures. *Id.* at 104.



impact statement, for portions of the Blue Creek and Eight-Mile Planning Units of Six Rivers National Forest that are largely roadless, undeveloped forest.<sup>7</sup> The final EIS was issued in 1975 and on October 19, 1976, the forest supervisor adopted a management plan permitting the harvest of 929 million board feet of timber over 80 years. Pet. App. 3a-4a, 55a, 59a.

Respondents appealed that decision. Following a remand of the matter by the chief of the Forest Service, the regional forester on February 19, 1981, directed the forest supervisor to reduce the proposed timber harvest by 21% to 733 million board feet. (J.A. 106-109). The modification rested in part upon the Indian religious and cultural considerations identified in the *Theodoratus Report*. The regional forester's decision established protective zones around Indian religious sites, forbidding all harvesting and other management activities within a one-half-mile radius of those sites. The chief of the Forest Service denied an appeal of the regional forester's decision. On January 8, 1982, the Forest Service adopted the modified management plan. Pet. App. 4a, 55a, 59a.

3. Respondents—an Indian cultural and religious organization, individual Indians, environmental organizations, individual members of those organizations, and the State of California—commenced actions in the United States District Court for the Northern District of California challenging the Forest Service's decisions to complete construction of the G-O road and adopt the management plan (J.A. 5-66). Respondents asserted that the Forest Service's actions violated the Free Exercise Clause of the First Amendment, the Clean Water Act, the National En-

<sup>7</sup> The Multiple-Use Sustained-Yield Act of 1960 directs the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (16 U.S.C. 529).

vironmental Policy Act, and a variety of other statutes.<sup>8</sup> The district court denied respondents' motion for a preliminary injunction barring construction of the G-O road (Pet. App. 92a-102a).

Following a trial, the district court entered judgment in favor of respondents (Pet. App. 53a-91a). It first concluded that the proposed construction of the road and implementation of the management plan violated respondents' rights under the Free Exercise Clause. Such action, the court held, "would seriously impair the Indian [respondents'] use of the high country for religious practices" because it would "seriously damage the \* \* \* visual, aural, and environmental qualities of the high country" (Pet. App. 63a, 64a-65a).<sup>9</sup> That effect constituted a burden on the Indian respondents' free exercise of religion (*id.* at 65a-66a), which the government had failed to

<sup>8</sup> Respondents also alleged violations of the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996; the Wilderness Act, 16 U.S.C. 1131 *et seq.*; the Administrative Procedure Act, 5 U.S.C. 706; the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*; the National Forest Management Act, 16 U.S.C. 1600 *et seq.*; and water and fishing treaty rights reserved to Indians living on the Hoopa Valley Indian Reservation. Pet. App. 4a, 56a.

<sup>9</sup> In reaching this conclusion, the district court observed that the Forest Service's actions would not intrude upon the actual sites of Indian religious ceremonies (Pet. App. 59a). The court, however, accepted respondents' claim that "construction of the Chimney Rock Section would violate the sacred qualities of the high country and impair its successful use for religious purposes" (*id.* at 58a). Thus, respondents asserted that the visibility of the road and the noise from the road would "impair the success of religious and medicinal quests into the high country" (*id.* at 59a (footnote omitted)). In addition, "environmental degradation of the high country resulting from construction of the road would erode the religious significance of the areas" (*ibid.*). Finally, "religious use of the area would be impaired by increased recreational use resulting from construction of the Chimney Rock Section" (*ibid.*).



justify by demonstrating an overriding state interest. Construction of the Chimney Rock section, according to the court, "would not materially serve several of the claimed governmental interests" (*id.* at 66a).<sup>10</sup>

The court further stated that any increase in the efficiency of Forest Service administration resulting from the construction of the road could not justify the infringement of respondents' free exercise rights, noting that the relevant administrative services "are efficiently provided at present" (Pet. App. 68a). It observed that the Forest Service's claim that construction of the road would increase competition in the timber industry was "too speculative" to outweigh the burden on respondents' free exercise rights, and that "[p]ast investment of resources in existing paved sections of the G-O road does not justify construction of the Chimney Rock Section. Those sections of the G-O road provide improved and useful access to vast recreational, timber, and other resources in the region" (*ibid.*).<sup>11</sup>

The district court also found that both the draft and final environmental impact statements regarding construction of the Chimney Rock section of the G-O road did not satisfy the requirements of the National Environmental Policy Act in certain respects. Pet. App. 75a, 81a-87a.<sup>12</sup>

<sup>10</sup> Thus, the court found that timber could be harvested without construction of the road; that the road would simply transfer jobs from Humboldt County to Del Norte County, not increase the number of jobs in the timber industry; and that increased recreational access was not relevant because "although recreational access to the area by means of motor vehicles would be somewhat improved, resulting environmental degradation would decrease the area's suitability for primitive recreational use" (Pet. App. 67a).

<sup>11</sup> The court also found that the government's interest in increasing the harvest of timber did not justify the burden on free exercise rights that would result from implementation of the management plan (Pet. App. 68a-69a).

<sup>12</sup> The court rejected a variety of other challenges to the sufficiency of the environmental impact statements (Pet. App. 71a-75a, 80a-81a).

Finally, the district court concluded that the construction of the road and implementation of the management plan would violate the Clean Water Act (Pet. App. 87a).<sup>13</sup>

On the basis of these legal conclusions, the court entered an injunction barring the government from constructing the Chimney Rock section of the G-O road and implementing the management plan (Pet. App. 91a).

4. While the case was pending before the court of appeals, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619. That statute designates a substantial portion of the Blue Creek and Eight-Mile areas of Six Rivers National Forest as a wilderness area (§ 101(a), 98 Stat. 1621-1624). Since commercial activities are prohibited in wilderness areas (16 U.S.C. 1133(c)), much of the timber harvesting enjoined by the district court on First Amendment grounds is prohibited under the statute. The statute expressly exempts a narrow strip of land from the wilderness designation "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." S. Rep. 98-582, 98th Cong., 2d Sess. 29 (1984); see also H.R. Rep. 98-40, 98th Cong., 1st Sess. 32 (1983). That strip is located so as to allow construction of the road planned by the Forest Service, which would follow a slightly different route from the present unpaved road. Because no similar exclusion was made for the unpaved road, that road is

It also concluded that the management plan EIS was deficient because it failed to assess properly the impact of the plan on the area's wilderness resource potential (*id.* at 82a-85a).

<sup>13</sup> The court rejected respondents' claims under the American Indian Religious Freedom Act (Pet. App. 70a-71a); the National Historic Preservation Act (*id.* at 85a-86a); the Multiple-Use Sustained-Yield Act (*id.* at 89a); and the National Forest Management Act (*ibid.*). The court held (*id.* at 88a) that the proposed government actions violated water and fishing rights reserved to Indians on the Hoopa Valley Indian Reservation. The court also found (*id.* at 88a-89a) that the other violations constituted violations of the Administrative Procedure Act.

now located in wilderness area and, accordingly, is closed to general vehicular traffic (see 16 U.S.C. 1133(c)). The only prospect for connection of the two paved segments of the G-O road, therefore, is proceeding with construction of the Chimney Rock section.

The court of appeals panel issued a decision on June 24, 1985, affirming the district court's decision in part and vacating in part (Pet. App. 38-52a). The government filed a petition for rehearing and suggestion for rehearing en banc. The panel granted the petition for rehearing, withdrew its initial decision, and issued a new decision (*id.* at 1a-2a).

5. On rehearing, a divided panel of the court of appeals substantially affirmed the decision of the district court (Pet. App. 3a-37a).<sup>14</sup> The majority first upheld the district court's conclusion that construction of the G-O road and implementation of the forest management plan would interfere with the Indian respondents' rights under the Free Exercise Clause.<sup>15</sup> It observed that the evidence in

<sup>14</sup> The court of appeals reversed the decision of the district court in only two respects. It held that the district court had erred by considering whether the Forest Service projects would breach the government's trust responsibilities to Indians living on the Hoopa Valley Indian Reservation. It found that "[b]ecause the Hoopa Valley Tribe was not a party to this action, \* \* \* this case [was not] an appropriate vehicle in which to determine the range and extent of the trust responsibility owed to the Tribe," and vacated the part of the injunction resting on that portion of the district court's opinion (Pet. App. 19a n.10).

The court of appeals further noted that enactment of the California Wilderness Act had rendered moot the portion of the district court's order directing the Forest Service to study the wilderness potential of the area covered by the management plan. The court therefore also vacated that part of the district court's order. Pet. App. 20a.

<sup>15</sup> The court noted that "[b]ecause most of the high country has now been designated by Congress as a wilderness area, the issue of logging becomes less significant, although it does not disappear" (Pet. App. 9a).

the record showed that "the high country is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the 'power' that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use" (*id.* at 9a (footnotes omitted)). Quoting the *Theodoratus Report*, the court of appeals found that the construction of the G-O road would " 'produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities' " because of the " 'degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities' " (*id.* at 10a). The court noted that "much of the adverse impact would be indirect, from increased uses made possible by the Road," but nonetheless concluded that "the Road would interfere with the free exercise of [respondents'] religion" (*ibid.*).<sup>16</sup>

The court of appeals found that no compelling government interest justified construction of the road. The court stated (Pet. App. 15a):

There was testimony that completion of the road and logging in the high country would increase employment in Del Norte County, but that this benefit would simply represent a shift of work from elsewhere in the state. There would be no statewide net gain in employment. There was evidence that forest management functions would be made easier by the road. There was evidence that the road would also provide greater recreation access to the area, but the projected use was not large. In our view, the government has

<sup>16</sup> The court rejected the contention that the district court's order barring construction of the road and implementation of the management plan violated the Establishment Clause (Pet. App. 11a-13a).



fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian [respondents'] free exercise rights.

The court of appeals upheld the district court's finding that the environmental impact statements were insufficient because they did not adequately discuss water quality issues (Pet. App. 15a-18a). It also concluded that the Forest Service projects would violate applicable state water quality standards if they "were implemented as described in the EISs" (*id.* at 19a).

Judge Beezer dissented with respect to the free exercise issue (Pet. App. 22a-37a). He observed that the *Theodoratus Report* found that construction of the road would have five effects upon Indian religious practices and—after evaluating each alleged adverse effect—concluded that they "did not justify the issuance of an injunction against the construction of the road" (*id.* at 29a). He found that "[t]hree of the five potential adverse effects cited in the report—logging, mining, and recreational use[s]—cannot support issuance of an injunction against road construction" because they could be eliminated by less drastic means and, in the case of recreational activities, did not present a threat "of constitutional magnitude" (*id.* at 32a). He further found that "[t]he remaining two potential adverse effects—road construction activities off the right-of-way and Forest Service activities—do not pose a serious threat to the practice of the Indian plaintiffs' religion" because they could be prevented by other means (*ibid.*).

Judge Beezer also rejected the other adverse effects cited by respondents. He found that the claim "that visibility of the road from religious sites would impair \* \* \* religious practices" lacked merit in view of the measures proposed by the Forest Service to mitigate the visual impact of the road (Pet. App. 33a). With respect to the argument that the road would result in increased noise, Judge Beezer ob-

served that "[w]hile it is possible that noise from the road would impair religious and medicinal quests in the area adjoining the road, it is apparent that the high country is a large area. The Indian plaintiffs have not established that their quests can take place only in the area near the road" (*id.* at 34a). Since the completion of the G-O road would not seriously impair respondents' religious practices, Judge Beezer would have reversed the district court's order granting the injunction.<sup>17</sup>

#### SUMMARY OF ARGUMENT

This case presents questions of fundamental importance regarding the interaction between the Free Exercise Clause and the government's authority to manage the public lands. Respondents challenge the construction of the final six-mile segment of a road through a national forest and the activities contemplated under a Forest Service land management plan on the grounds that their general religious beliefs, as well as the effectiveness of certain religious rituals, are dependent upon the preservation in its natural state of the area of the Six Rivers National Forest that would be affected by these government actions. Respondents assert that because the construction of the road and the adoption of the management plan would disturb the natural environment, and thereby infringe their religious beliefs, those actions are prohibited by the Free Exercise Clause.

<sup>17</sup> Judge Beezer stated that in light of the passage of the California Wilderness Act, "[t]he first amendment issues raised by the proposed development of the newly designated wilderness area [pursuant to the management plan were] moot" (Pet. App. 35a). Since it was "not clear whether the district court would have issued an injunction [barring implementation of the management plan] based upon the development of the remaining small parcels," he concluded that a remand was appropriate "to allow the district court to reevaluate its injunction in light of the Act" (*ibid.*).



This Court's decisions establish a two-step inquiry in evaluating claims that government has infringed rights protected by the Free Exercise Clause. As a threshold matter, the claimant must establish that the challenged government action burdens his religious liberty in a manner that implicates the constitutional guarantee. Even if such a burden is demonstrated, the government action may be upheld if it is supported by a sufficiently weighty government interest.

A. Respondents have failed to show that the government actions at issue here burden their religious liberty in a manner that triggers the protection of the Free Exercise Clause. This Court's decisions define the freedom to act guaranteed by the Free Exercise Clause as the right to shape one's own religious conduct free from the influence of coercive government action, whether in the form of direct regulation or in the form of conditions upon a public benefit that require the compromise of religious faith. The decisions to build the road and adopt the land management plan do not fall into either of these categories. Indeed, these decisions are not directed toward respondents at all, but rather concern the government's management of its own property in ways that have unavoidable but quite incidental effects on individuals.

Far from resembling any case in which this Court has found a burden on rights protected by the Free Exercise Clause, the present case is very similar to *Bowen v. Roy*, No. 84-780 (June 11, 1986), in which the Court concluded that the plaintiffs had failed to satisfy that threshold requirement. The Court there squarely rejected the argument that "the First Amendment [requires] the government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family" (slip op. 6 (emphasis in original)). Since respondents' claim rests on essentially the same contention, it too must fail.

Respondents' assertion of a burden on their free exercise rights is defective for the additional reason that what they actually seek is an affirmative benefit from the government — the management of government property in a manner that enhances the practice of their religion. This Court has in a variety of contexts rejected the contention that a constitutional right carries with it the requirement that the government subsidize the exercise of that right. The Free Exercise Clause simply does not require government to provide individuals with the wherewithal to engage in religiously motivated conduct.

We recognize that many Indian religious sites are located on land owned by the federal government, providing numerous occasions for collision between Indian religious beliefs and government land management activities. The conclusion that the Free Exercise Clause is not implicated by the government actions at issue here does not mean that governmental agencies have been left free to manage publicly owned lands in any manner that they choose or to ignore the significance that particular land may hold for a particular religious group. To the contrary, the political Branches have proven receptive to requests for preservation of government land on the ground that the land is significant to Indian religious beliefs. In addition, specific statutory provisions require policymakers to give careful consideration to Indian religious interests before authorizing government action that infringes upon those interests. Indeed, the Forest Service's solicitude for the Indians' interests in this case is a textbook example of such sensitive government decision making.

B. Even if the Court concludes that the land management decisions at issue here do burden respondents' free exercise rights, those decisions should be upheld because they are supported by a sufficiently weighty government interest. The Court has stated that government action burdening an individual's free exercise rights must be

justified by a compelling interest, but it has never applied that standard in the context of a challenge to government action involving the management of public land.

The government has a strong interest in managing the public domain pursuant to statutory procedures and in a manner that best harmonizes the competing land use considerations articulated by Congress. Not only the government, but many individuals engaged in all manner of commercial and recreational endeavors have a direct interest in the ways in which the public domain is utilized and in the process by which those decisions are reached. Due consideration for the proper exercise of this important governmental responsibility requires that the balance between government and individual interests be struck somewhat differently with respect to free exercise claims relating to the government's authority to control the physical development of its land, such as the claim asserted by respondents here. A showing of the reasonableness of the government action should be sufficient to justify a land management decision that is subject to scrutiny under the Free Exercise Clause.

The decision to construct the final six-mile section of the G-O road was eminently reasonable. The road will improve recreational access to the area, increase competition for federal timber contracts, and improve the efficiency of the administration of the area by the Forest Service. Indeed, the 1984 designation of the surrounding area as wilderness has required the closing of the former route connecting the two completed portions of the G-O road. The choice is now between a paved road or no through road at all. The government interest in preserving a road through the forest is clearly sufficient to satisfy the applicable constitutional standard.

## ARGUMENT

### THE DECISIONS TO CONSTRUCT THE FINAL SIX-MILE SEGMENT OF THE G-O ROAD AND ADOPT THE MANAGEMENT PLAN DO NOT VIOLATE THE FREE EXERCISE CLAUSE

The Free Exercise Clause "embraces two concepts, — freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see also *McDaniel v. Paty*, 435 U.S. 618, 626-628 & n.5 (1978) (plurality opinion). An individual's freedom to believe is absolutely protected against government regulation. "Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); see also *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion) ("[c]ompulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute.").

An individual's freedom to act in a manner consistent with his religious beliefs is accorded somewhat narrower constitutional protection. "Conduct remains subject to regulation for the protection of society"; at the same time, however, "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" (*Cantwell v. Connecticut*, 310 U.S. at 304 (footnote omitted)).

This Court has devised a two-step inquiry to evaluate claims that government has infringed the freedom to act protected by the Free Exercise Clause. As a threshold matter, the claimant must establish that government has "actually burden[ed] [his] freedom to exercise religious rights." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985); see also *Hobbie v.*



*Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), slip op. 3-5; *Sherbert v. Verner*, 374 U.S. at 403 (first inquiry is whether the government action "imposes any burden on the free exercise of [the claimant's] religion"). Even if a burden on free exercise rights is established, the government action may be upheld when "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); see also *United States v. Lee*, 455 U.S. 252, 257-258 (1982).

The basis for the court of appeals' decision appears to be that the land management decisions interfere with the Indian respondents' freedom to act in accordance with their religious beliefs.<sup>18</sup> We demonstrate below, however, that the challenged decisions do not impose a burden upon respondents' religious liberty that is cognizable under the Free Exercise Clause. Even if the government actions are found to burden respondents' free exercise rights, moreover, they do not violate the Constitution because they are justified by a sufficiently weighty governmental interest.

#### A. The Challenged Land Management Decisions Do Not Burden The Indian Respondents' Free Exercise Rights

As we have discussed, the threshold inquiry under the Free Exercise Clause is whether the challenged government action burdens the claimant's religious liberty in a manner that implicates the constitutional guarantee. We do not dispute the sincerity of the Indian respondents' religious beliefs. And we do not quarrel with the determination of

<sup>18</sup> Neither the court of appeals nor the district court suggested that the government has engaged in any regulation or compulsion concerning religious belief itself. Nor could they. The construction of the G-O road and the adoption of the management plan neither compel any individual to affirm any religious belief nor discriminate on the grounds of religious belief.

the courts below that the government actions at issue here infringe upon important elements of those religious beliefs. The construction of the G-O road and the activities contemplated by the land management plan obviously will disturb the natural environment of the high country. Respondents state that their faith prohibits any such disturbance and that the effectiveness of their religious rituals is dependent upon "the unitary pristine nature of the high country" (Pet. App. 9a); it is not for government to second-guess respondents' interpretation of the tenets of their religion. See *United States v. Lee*, 455 U.S. at 257; *Thomas v. Review Board*, 450 U.S. 707, 716 (1981).

But these facts by themselves do not suffice to establish a burden upon respondents' interests cognizable under the Free Exercise Clause. Not every government action that makes more difficult the practice of a particular religious faith amounts to a burden that must be justified by compelling policy interests. This Court's decisions make clear that the freedom to act guaranteed by the Free Exercise Clause is much more narrowly defined. It encompasses the right to shape one's own religious conduct free from coercive governmental action, whether in the form of direct prohibitions or commandments or conditions upon the right to a public benefit that require the compromise of one's religious faith.<sup>19</sup> The Free Exercise Clause is not a mandate for judicial scrutiny of any and all governmental conduct which to a given believer produces a less congenial world. Like many other official actions which in no sense coerce a decision against faith, therefore, the government's nondiscriminatory decisions regarding the management of the public lands simply do not implicate the Free Exercise Clause.

<sup>19</sup> The government may, of course, exercise coercion in connection with conduct grounded in religious faith where such action can be justified by compelling interests. See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *United States v. Lee*, *supra*.



1. This Court's decisions make clear that government burdens the freedom to act protected by the Free Exercise Clause only when it coerces an individual to engage in conduct inconsistent with his religious beliefs. "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963); see also *Harris v. McRae*, 448 U.S. 297, 321 (1980); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968).

Government coercion often takes the form of direct regulation of religiously motivated conduct. In *United States v. Lee*, *supra*, for example, the plaintiff challenged a statute requiring him to pay a portion of his employees' social security taxes, asserting that his religious beliefs prohibited him from participating in the social security system. While ultimately upholding the statute, this Court stated that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs *compulsory participation in the social security system interferes with their free exercise rights*" (455 U.S. at 257 (emphasis added)).<sup>20</sup> Most of the other cases in which the Court has found a burden on free exercise rights involve similar direct regulations of the conduct of the individual asserting the free exercise claim. *Wisconsin v. Yoder*, 406 U.S. at 218 (the challenged compulsory school attendance law "affirmatively compel[led] individuals], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs"); *Gillette v. United States*, 401 U.S. 437, 461-462 (1971) (mandatory military service obligation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (prohibition on child labor); *Cantwell v. Connecticut*, *supra* (licensing requirement for religious

<sup>20</sup> The regulation was upheld by this Court on the ground that it was justified by an overriding governmental interest (see 455 U.S. at 258-260).

solicitation); see also *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. at 303-304 (no burden on free exercise rights where statute did not require individuals to act in a manner inconsistent with their religious beliefs).

The Court has also found governmental coercion sufficient to trigger the protections of the Free Exercise Clause in situations where government forces individuals to choose between the relinquishment of a governmental benefit and the compromise of religious belief. In *Sherbert v. Verner*, *supra*, for example, Sherbert had been discharged for her refusal to work on Saturday, which was her Sabbath, and was denied unemployment benefits on the ground that her refusal to work on Saturday was not a permissible reason for declining to accept work. The Court noted that "no criminal sanctions directly compel [Sherbert] to work a six-day week," but observed that her "declared ineligibility for benefits derives solely from the practice of her religion" and that "the pressure upon her to forego that practice is unmistakable" (374 U.S. at 403, 404).

The Court stated that the denial of Sherbert's claim for unemployment benefits had the effect of forcing her to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404). It concluded that "[g]overnmental imposition of such a choice puts *the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship*" (*ibid.* (emphasis added)). *Sherbert* and its progeny thus stand for the proposition that the Free Exercise Clause's protection for religiously grounded conduct is called into play when the government subjects an individual to the choice of obtaining a benefit or complying with the dictates of faith, "thereby putting substantial

pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Board*, 450 U.S. at 717-718; see also *Hobbie v. Employment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), slip op. 3-5.<sup>21</sup>

The Court's recent decision in *Bowen v. Roy*, No. 84-780 (June 11, 1986), further illuminates the contours of the protection conferred by the Free Exercise Clause. One of the contentions advanced by the plaintiffs in *Roy* was that the government's use of a social security number to identify their daughter would "serve to 'rob [her] spirit' \* \* \* and prevent her from attaining greater spiritual power" (slip op. 2-3). Eight Justices joined in reversing the district court's injunction barring the government from using the social security number issued in the daughter's name, holding that the plaintiffs had not established a free exercise claim because "[t]he Federal Government's use of a Social Security number [to identify the plaintiffs' daughter] does not itself in any degree impair [the plaintiffs'] 'freedom to believe, express, and exercise' [their] religion" (*id.* at 7 (footnote omitted)).

The Court stated that "[j]ust as the Government may not insist that [the plaintiffs] engage in any set form of religious observance, so [the plaintiffs] may not demand

<sup>21</sup> In our amicus curiae brief in *Hobbie v. Unemployment Appeals Comm'n*, *supra*, we argued that a neutral, noninvidious denial of government benefits standing alone did not entitle an individual to invoke the protection of the Free Exercise Clause because the denial did not "prohibit[] the free exercise" of religion. The Court rejected our submission, quoting its prior determinations in *Sherbert* and *Thomas* regarding the "coercive impact of the forfeiture of benefits in [the unemployment compensation] situation" (*Hobbie*, slip op. 4). Thus, the Court did not conclude in *Hobbie* that the presence of government coercion is irrelevant in determining whether a plaintiff has stated a free exercise claim. To the contrary, the Court recognized the coercion requirement (slip op. 3-5), but concluded that the requirement is satisfied where unemployment benefits are denied on the basis of an applicant's religiously motivated conduct.

that the Government join in their chosen religious practices by refraining from using a number to identify their daughter" (slip op. 6). Because the government action challenged in *Roy* involved no coercion of the plaintiffs to do or refrain from doing anything at all, but instead related solely to the government's management of its own affairs, the government action did not burden the plaintiffs' free exercise rights.<sup>22</sup>

2. The courts below found that the decisions to construct the G-O road and adopt the management plan burden the Indian respondents' free exercise rights because

<sup>22</sup> The history of the Free Exercise Clause provides additional support for the conclusion that an individual's freedom to act in accordance with his religious beliefs is violated only when the government attempts to coerce the individual to act in a contrary manner. The Court has repeatedly recognized the role of Thomas Jefferson's Virginia Bill of Religious Liberty as an earlier formulation of the ideas embodied in the Religion Clauses of the First Amendment. *McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson v. Board of Education*, 330 U.S. 1, 12-13 (1947); *Reynolds v. United States*, 98 U.S. 145, 163-164 (1878). As enacted, the bill provided in part (12 W. Hening, *Statutes of Virginia* 86 (1823)):

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief[.]

This language emphasizes that the evil against which the First Amendment seeks to protect is government coercion of individual religious choice. See also 1 *Annals of Cong.* 758 (J. Gales ed. 1834) (James Madison) (First Amendment provides "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience"). Indeed, Jefferson's express reference to burdens affecting the individual's "body or goods" undercuts any argument that the protected right encompasses an affirmative entitlement to demand that government manage its own resources and activities in a manner that avoids even incidental effects on an individual's religious interests.



the resulting activities would "seriously damage the \* \* \* visual, aural, and environmental qualities of the high country" (Pet. App. 64a-65a). Since those qualities are an essential element of the Indians' religious beliefs, the government action would lead to an "irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok, and Tolowa communities" (*id.* at 10a (citation and quotation marks omitted)). The conclusion that these effects amount to a burden on respondents' free exercise rights is wrong for two separate reasons.

a. The facts proffered by respondents to establish a burden on their free exercise rights are plainly insufficient under the standard set forth in this Court's prior decisions. The land management decisions challenged by respondents do not command or coerce respondents to perform an act prohibited by their religion or to refrain from performing an act mandated by their religion. Indeed, these decisions are not directed toward respondents at all, but rather concern the government's management of its own property in ways having unavoidable but incidental effects on individuals.<sup>23</sup>

Far from resembling any case in which this Court has found a burden on rights protected by the Free Exercise Clause, the present case is very similar to *Bowen v. Roy*, *supra*, in which the Court concluded that the plaintiffs had failed to satisfy that threshold requirement. Respondents' claim here—that the construction of the road will impair the Indians' spiritual life and practices—rests upon the same basic proposition as did the plaintiffs' claim in *Roy*.

<sup>23</sup> The land management decisions cannot be analogized to either of the two types of government compulsion recognized by this Court in its prior decisions. First, they plainly do not directly regulate private conduct. Second, and just as obviously, the construction of the G-O road and adoption of the management plan do not present individuals with a choice between (1) following the precepts of their religion and forfeiting a government benefit, or (2) abandoning those precepts in order to obtain an economic benefit.

The underlying contention is that the Free Exercise Clause not only shields an individual from direct or indirect government coercion, but also confers a right to insist that, in the absence of compelling countervailing concerns, government's own affairs be conducted in a manner that will assist in the individual's spiritual development.

This Court observed in *Roy* that it had never before found "the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family" (slip op. 6 (emphasis in original)). It then proceeded to reject that proposition, holding that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens" (*ibid.*). "The Free Exercise Clause is written in terms of what the government cannot do to the individual," the Court stated, "not in terms of what the individual can extract from the government." *Ibid.*, quoting *Sherbert v. Verner*, 374 U.S. at 412 (Douglas, J., concurring).

*Roy* clearly compels the rejection of respondents' claim here. Respondents argue that the Free Exercise Clause requires the government to manage federal land in a way that is consistent with their religious beliefs about how that land should be maintained. Since the Clause does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development" (*Roy*, slip op. 6 (emphasis in original)), it does not require the implementation of respondents' religiously motivated land management plan.<sup>24</sup>

<sup>24</sup> The court of appeals attempted to distinguish *Roy* on two grounds. First, it asserted that the plaintiffs in *Roy* challenged the government conduct because it "offended [their] religious sensibilities," but that the Forest Service actions "would greatly impair religious exercises of [respondents] in the only place where they can



Moreover, the rule adopted in *Roy* is eminently sensible. The basic purpose underlying the free exercise inquiry is to ascertain whether the challenged government action impairs an individual's freedom to think or act pursuant to the dictates of his religious beliefs. Accordingly, it is most appropriate that the existence of a governmental restriction upon the individual's belief or conduct — his ability to

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be performed" (Pet. App. 11a (footnote omitted)). The court's characterization of the claim in *Roy* is incorrect; as we have discussed, the plaintiffs in that case asserted that the government's use of the social security number would rob their daughter of her spirit and "prevent her from attaining greater spiritual power" (slip op. 3). That claim is very similar to respondents' contention that the Forest Service actions at issue here will impair the sacred character of the high country. In both cases, the claim is that the government's decision to manage its affairs in certain ways that are not coercive of any individual's belief or conduct will have a drastic adverse effect upon the spiritual well-being of the plaintiffs. Indeed, the Ninth Circuit's off-handed dismissal of the *Roy* plaintiffs' claims in terms of their "sensibilities" is exactly the kind of evaluation of the importance and validity of religious beliefs that is precluded by the Free Exercise Clause.

The court of appeals' second basis for distinguishing *Roy* is that "logging and road-building on public lands, to which the public has access, is not the kind of internal government practice that the Court found beyond free exercise attack in *Roy*" (Pet. App. 11a). Of course, the government's use of a social security number and the Forest Service's development of government lands are different in many ways, but the court of appeals never explained why any difference is relevant. In both instances the government undertakes actions in respect to property and procedures that are the government's to manage, and the complainant's objection relates to his perception of how the government's action may adversely affect his spiritual life. Moreover, the Court in *Roy* did not rest its decision on the peculiar factual characteristics of the benefit program at issue in that case, but upon the observation that while the Free Exercise Clause bars the government from prescribing the religious beliefs of individuals, it does not require the government to act in accordance with the religious beliefs of any individual (slip op. 6).

follow his own lights — should serve as the trigger for constitutional scrutiny.

Altering the scope of the Free Exercise Clause so as to encompass claims like the one advanced here would work an essentially limitless expansion in the types of government action subject to free exercise scrutiny. An individual may, by religious conviction, attach significance to practically any government conduct or property. For example, an individual could assert that expenditure of government funds for social welfare programs is required by his religious beliefs and that the failure to expend funds in that manner will nullify the spiritual effect of his religious observances; others could hold the contrary view. Another individual could assert that eagles are sacred and the use of the eagle as our national symbol constitutes an affront that interferes with his religious practices. Others could argue that use of government funds to assist certain foreign governments, or the refusal to grant such assistance, offends their religious principles. All of these claims resemble the claim advanced by respondents in that the asserted free exercise burden is an impairment of spiritual welfare resulting from government policies that in no way compel or coerce religious conduct or belief.

Such claims are likely to be especially prevalent in respect to the public lands. The natural environment is often an important element in Indian religious belief; many government actions affecting the environment thus could cause the sort of impairment of spiritual welfare asserted by respondents here.<sup>25</sup> And no principle of law limits such claims to adherents of traditional religions or to sites historically used for religious purposes. An individual is free to conclude for himself that a particular

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<sup>25</sup> A number of such claims have been the subject of reported decisions. See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied,

characteristic of any government property—park, public building or monument—is central to his religious beliefs. For such an individual, government interference with that characteristic would constitute an impairment of spiritual welfare even if the government action does not coerce or compel religious conduct or belief.

The essential genius of the Religion Clauses is that the definition of religion is left in the hands of the people, not to be usurped by government. See, e.g., *Thomas v. Review Board*, 450 U.S. at 714-716; *United States v. Ballard*, 322 U.S. 78, 86-88 (1944); cf. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). But it is this very subjectivity in the definition of religion that calls out for an objective limit on the scope of the Free Exercise Clause. There is otherwise a danger that, freed of the clear limitation announced in the Court's prior decisions—that the challenged regulation must coerce the claimant to act in a manner inconsistent with his religious beliefs—any govern-

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464 U.S. 956 (1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985), appeal pending, No. 87-5118 SD (8th Cir.); *Inupiat Community v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984), cert. denied, 474 U.S. 820 (1985); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), aff'd on opinion below, 706 F.2d 856 (8th Cir.), cert. denied, 464 U.S. 977 (1983).

The Forest Service and the Department of the Interior inform us that more than 30 other religion-based claims urging particular uses of federal land are now pending at various stages of the administrative process. These claims may be resolved in the administrative process. If they are not, however, the claimants may attempt to require the government to comply with their demands by invoking the interpretation of the Free Exercise Clause adopted by the court below. See, e.g., *All Indian Pueblo Council v. United States*, No. 87-0642 JC (D.N.M.) (Free Exercise Clause challenge to construction of electric transmission line across federal land).

ment action would potentially be subject to judicial review under a compelling interest standard. In order to avoid that result, the Court should adhere to the rule announced in *Roy* and hold that respondents have failed to demonstrate a burden on their free exercise rights.

b. The court of appeals based its contrary conclusion in part upon an analogy to this Court's reasoning in *Sherbert*, intimating that the land management decisions in issue here impose an "indirect" burden on respondents' rights sufficient to trigger the Free Exercise Clause (see Pet. App. 11a). In fact, respondents are situated far differently from the plaintiffs in *Sherbert* and its progeny. Whereas the Court in those cases found a burden upon free exercise rights because the plaintiffs were put to a choice of forsaking their beliefs or relinquishing benefits to which they would otherwise be entitled, respondents are put to no such choice. Rather than seeking protection from a coercive limitation upon a government benefit program, as in *Sherbert*, respondents here assert a constitutional right to their own individualized benefit program—the management of lands owned by the government in a way that enhances the practice of respondents' religion. Their claim thus amounts to a request that the government subsidize their religious practices.<sup>26</sup>

This Court has in a variety of contexts rejected the contention that a constitutional right carries with it the re-

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<sup>26</sup> The costs of maintaining this land in the manner directed by respondents' religion would, of course, be borne by the United States, not by respondents. Those costs include the additional monetary expense to the government that would result from the failure to complete the G-O road as well as the more general costs to society at large of the loss of the benefits that would flow from the completion of the road. It is noteworthy that claims such as those advanced here could in other cases require the government to forgo development of timber or mineral resources that might yield monetary revenues.



quirement that the government subsidize the exercise of that right. "It is one thing to say that a State may not prohibit [an activity] and quite another to say that such [activity] must \* \* \* receive state aid" (*Norwood v. Harrison*, 413 U.S. 455, 462 (1973)). Thus, in *Harris v. McRae*, *supra*, the Court rejected the argument "that a woman's freedom [to choose whether to have an abortion] carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices" (448 U.S. at 316). "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice," the Court stated, "it need not remove those not of its own creation." *Ibid.*; see also *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976) (per curiam) (recognizing difference between a prohibition and a refusal to provide a financial subsidy); cf. *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9, 15-16 (1978) (plurality opinion) (free press guarantee bars government interference with the press, but does not impose affirmative duty upon government to provide the press with information).

The Free Exercise Clause similarly should not be construed to require government to provide a subsidy to religiously motivated practices. No one would contend that if a government had no employment insurance program at all, the Free Exercise Clause would require the payment of benefits to persons discharged because they observe their Sabbath on Saturday. Similarly, the Clause does not require the government to provide respondents with what is essentially the equivalent of a cash payment—the management of public property in a way that enhances their spiritual development, but imposes additional costs or burdens upon the public at large. See *Sherbert v. Verner*, 374 U.S. at 412 (Douglas, J., concurring) ("[t]he fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of

money, the better to exercise them"); *Crow v. Gullet*, 541 F. Supp. 785, 791-792 (D.S.D. 1982) ("the free exercise clause places a duty upon [government] to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out"), *aff'd on opinion below*, 706 F.2d 856 (8th. Cir.), *cert. denied*, 464 U.S. 977 (1983).<sup>27</sup>

3. The fact that the Free Exercise Clause is not implicated if the federal government decides to manage the public lands in a manner inconsistent with Indian religious beliefs does not mean that government agencies have been left free to ignore those religious beliefs—and the effect of their actions upon believers—in formulating land management policy. To the contrary, the United States has repeatedly recognized its moral obligation to deal fairly with the Indians. Not only has Congress proven itself willing to adopt legislation protecting Indian religious sites and practices, but existing statutes impose upon the Executive

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<sup>27</sup> Indeed, a simple analogy demonstrates the striking breadth of the new right created by the court of appeals. In the free speech context, this Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. \* \* \* [T]he extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985); see also *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The public forum doctrine, however, describes only a "right of access to public property" (*Perry Education Ass'n*, 460 U.S. at 44 (emphasis added)), and the Court has never suggested that there are other First Amendment limits upon the government's authority to manage its property. Thus, a city's decision to erect an office building on a site currently occupied by a park need not be justified by a compelling government interest. Cf. *Perry Education Ass'n*, 460 U.S. at 46 (government free to alter character of public forum by designation). The logical implication of the court of appeals' constitutional theory, however, would be that *all* aspects of government's management of its property are subject to review under the public forum rubric.



Branch a general obligation to take the Indians' religious heritage into account in all aspects of government decision making. Congress's "distinctive \* \* \* response" to the Indians' concerns undercuts any claim that scrutiny under the Free Exercise Clause is necessary to ensure that Indian religious interests will be considered in the government decision-making process. Cf. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 443 (1985).<sup>28</sup>

First, Congress has expressly adopted legislation accommodating specific Indian religious interests in federal land of the type asserted by respondents here. See, e.g., 16 U.S.C. (Supp. III) 543f (requiring "nonexclusive access to [the Mono Basin National Forest Scenic Area] by Indian people for \* \* \* traditional cultural and religious purposes"); 16 U.S.C. 228i (designating portion of Grand Canyon National Park as land held in trust for Havasupai Indians with specific proviso that land may be used for religious purposes); Pub. L. No. 98-408, 98 Stat. 1533 (setting aside land for the Zuni Indians for religious purposes); Pub. L. No. 98-344, 98 Stat. 315 (setting aside for the Pueblo de Cochiti Indians federal land containing important religious sites); Pub. L. No. 91-550, 84 Stat. 1437 (setting aside land for use by the Pueblo de Taos Indians for traditional religious purposes).

Indeed, the wilderness designation of the portion of Six Rivers National Forest containing much of the high country (see page 11, *supra*) is another example of Congress's willingness to act to protect Indian religious interests. That designation, which has the effect of ensuring that a con-

<sup>28</sup> To be sure, the protections now available would be strengthened if Indians such as respondents could add a free exercise claim to their arsenal. But, as we show below, respondents cannot contend that it is the Free Exercise Clause or nothing as far as protection for their religious rights are concerned. What they actually seek is a way to ensure that their concerns will be given *paramount* weight in land use decision making.

siderable portion of the area will be maintained in a manner consistent with respondents' religious beliefs, was based in part upon Congress's determination that "the area contains several sites \* \* \* of critical importance to Native Americans for cultural and religious purposes" (H.R. Rep. 98-40, 98th Cong., 1st Sess. 32 (1983)).

Second, statutes governing administrative decision making require federal agencies to consider Indian religious interests before embarking upon actions that might adversely affect those interests. The National Environmental Policy Act (NEPA) directs federal agencies to prepare an environmental impact statement (EIS) with respect to all "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)). These statements both "inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS" and "inform the public that the agency has considered environmental concerns" (*Weinberger v. Catholic Action*, 454 U.S. 139, 143 (1981)). The regulations governing the preparation of environmental impact statements indicate that "social effects" related to the effect of the proposed federal action on the environment—such as effects on Indian religious interests—must be analyzed in the EIS (40 C.F.R. 1508.14). Moreover, Indian tribes must be invited to assist in identifying the effects to be discussed in the EIS (40 C.F.R. 1501.7(a)(1)).<sup>29</sup> In the event the administrative process does not perform as intended, persons affected by government action may seek redress in court. Thus, in an action under the Administrative Procedure Act, courts may consider claims that an agency failed to comply with the requirements of NEPA. See, e.g., *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223

<sup>29</sup> Additional procedural protections frequently may be available under the National Historic Preservation Act, 16 U.S.C. 470a. See Pet. App. 85a-86a (discussing the Forest Service's compliance with that statute in this case).

(1980); *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1010-1012 (5th Cir. 1980). And the Administrative Procedure Act also provides for judicial review of the substance of agency action under an "arbitrary and capricious" standard (see 5 U.S.C. 706).

In addition, the American Indian Religious Freedom Act, 42 U.S.C. 1996, states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions \* \* \*, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites." The statute mandates both consultation with Indian tribes affected by government action and elimination of unnecessary interference with Indian religious interests. See *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

The facts of this case are virtually a textbook example of the government's willingness to consider and attempt to accommodate Indians' religious interests. When the potential impact upon Indian religious interests of construction of the G-O road became clear, the Forest Service commissioned full-scale ethnographic and archaeological studies of the cultural resources of the area. See page 6, *supra*.<sup>30</sup> After the studies were completed, the plans for the road and the land management plan were modified to mitigate the intrusion into areas of religious significance. See pages 6-8, *supra*; J.A. 95-98, 100-105, 106-109.<sup>31</sup>

<sup>30</sup> That study is respondents' principal source of evidence in support of their free exercise claim.

<sup>31</sup> Respondents contend that these efforts at mitigation were insufficient, but that is because their religious beliefs preclude the construction of any road at all.

**B. Even If The Forest Service's Decisions Infringe Upon Interests Protected By The Free Exercise Clause, The Governmental Interests Supporting Those Decisions Are Sufficiently Weighty To Justify The Infringement On Respondents' Rights**

Even if the Court concludes, contrary to our submission, that the decisions to construct the G-O road and adopt the management plan do burden the Indian respondents' free exercise rights, those decisions should nonetheless be upheld because they are supported by a sufficiently weighty governmental interest.

When this Court has found that government action burdens an individual's free exercise rights, it has inquired whether the government action is justified by a compelling government interest and is narrowly tailored to serve that interest. See page 20, *supra*. But none of this Court's prior decisions addresses a free exercise challenge to government action involving the management of public land. As a threshold matter, therefore, it is necessary to consider how the compelling interest standard applies in this context.

The public lands are a finite resource and each individual parcel is unique. Moreover, the potential uses for a particular piece of property are frequently incompatible. The determination that one use is appropriate for a site may rule out several other competing uses for both that site and the surrounding area. And these potential uses are not simply abstractions. The decision whether to permit timber harvesting or mining, for example, may be critical to the economic well-being of an entire area. The improvement of recreational access, on the other hand, may enable many more citizens to make use of particular property. Land management decisions thus resemble a zero sum game in which the government must choose among various individuals' competing claims to use particular public land.



The legal authority governing the management of the public lands reflects these unique characteristics. The Property Clause of the Constitution vests Congress with the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (U.S. Const. Art. IV, § 3, Cl. 2). Congress has exercised this authority by directing the Secretary of Agriculture to administer the national forests "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528; see also 16 U.S.C. 472a, 475, 551. In addition, the Secretary must "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (16 U.S.C. 529).<sup>32</sup>

These statutes endow the Secretary with considerable discretion in balancing the myriad competing public policy concerns that must be factored into land use determinations. See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 729 (1972); *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971) ("Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service"); cf. S. Rep. 94-583, 94th Cong., 2d Sess. 39 (1975) (leaving to the Secretary of the Interior the task of balancing competing priorities under the Federal Land Policy Management Act).

The resource management decisions resulting from the statutory decision-making process—in the absence of identifiable legal error—implement the expressed will of Congress concerning the resolution of competing claims for

<sup>32</sup> Similarly broad grants of authority govern the administration of other federally owned lands. See 16 U.S.C. 1600-1614; 43 U.S.C. 1700-1712, 1732.

use of the public lands. This Court repeatedly has recognized the significance of the federal interest in putting such determinations into effect, stating that the United States "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, (NAACP Legal Defense Fund), 473 U.S. 788, 800 (1985), quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976); see also *Perry Education Ass'n v. Perry Local Educators' Assn*, 460 U.S. 37, 46, 50-51 (1983); *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-130 (1981).

The government's strong interest in resolving conflicting claims for use of the public domain pursuant to statutory procedures and in a manner that best harmonizes the competing policies articulated by Congress must be given appropriate weight in the analysis of claims under the Free Exercise Clause. Indeed, the Court has already recognized this interest in the framework it has developed for considering claims that the government has violated an individual's free speech rights by denying his request for access to government facilities. If the government property is a public forum—a place "which 'by long tradition or by government fiat [has] been devoted to assembly and debate,' " a place designated by the government "for use by the public at large for assembly and speech", or a place designated for such uses by a particular subset of the general public—an individualized showing of a compelling interest is required. *NAACP Legal Defense Fund*, 473 U.S. at 802-803, 806 (citation omitted); see also *Perry Education Ass'n*, 460 U.S. at 45-46; *Widmar v. Vincent*, 454 U.S. 263 (1981) (university's policy of permitting use of its property by student groups created a public forum



as to the property's use by such groups). With respect to other categories of government property—nonpublic fora—the government may exercise control over access “so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are view-point neutral” (*NAACP Legal Defense Fund*, 473 U.S. at 806).

The appropriateness of applying a reasonableness standard in the circumstances of this case follow *a fortiori* from this analysis. The free exercise claim advanced by respondents does not merely seek *access* to government property, as is the case with claims made in the free speech context; it intrudes far more deeply into the management of the public lands. Permanently barring the government from maintaining and developing its own property to achieve what it has determined to be the best uses of that property is far more onerous—and far more preclusive of other individuals' competing claims to use of the particular land—than requiring the government to allow an individual access to its property while leaving undisturbed the government's physical management of permissible uses. In view of this significantly greater intrusion, the government's distinct interest in defining the permissible uses of its property, and in administering that property for the benefit of all members of the public, must be accorded greater weight in the balancing process here. Accordingly, regardless of whether the land at issue here would qualify as a “public forum” under the definition of that term developed in this Court's free speech cases or under a definition specially devised for the free exercise context, a claim such as that asserted by respondents here is properly reviewed under a reasonableness standard.<sup>33</sup>

Moreover, the reasons that a greater burden of justification is sometimes placed on the government in the First

<sup>33</sup> Claims seeking only *access* to public property for religious worship are analyzed under the public forum doctrine. See *Widmar v. Vincent*, 454 U.S. at 269 n.6; page 39, *supra*.

Amendment context simply do not apply here. The Court has stated that government's reduced authority to limit access to traditional public fora, which essentially consist of city parks and streets, stems from the fact that these types of property have “time out of mind \* \* \* been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); see also *NAACP Legal Defense Fund*, 473 U.S. at 802. Perhaps largely because of our tradition of separation of church and state, we have no such history of allowing individuals to control the *management* and *development* of, as opposed to *access* to, public land for their own religious purposes.

Further, the decision to attach religious significance to a particular parcel of land owned by the government is wholly unrelated to the land use selected by the government; it flows solely from individual religious belief. Since it is well settled that the government may not be divested of its property interests by adverse possession (*Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)), an individual cannot acquire greater control over the way public property is to be utilized simply by virtue of his own prior use of that property for religious purposes. Accordingly, a specific showing of reasonableness, combined with the government's general interest in managing its property, is sufficient to establish a compelling interest in support of a particular government land management decision.<sup>34</sup>

<sup>34</sup> Of course, if the government engages in invidious discrimination on religious grounds, a First Amendment claim would be made out. And none of the considerations discussed in the text above operate to deprive government of the option of allowing or even facilitating access to government property as an accommodation of religion, nor do they suggest that such accommodation raises problems under the Establishment Clause.

Applying that test to the facts of the present case, it seems clear that the decision to construct the final segment of the G-O road was reasonable.<sup>35</sup> In the 1960s, the Forest Service decided to upgrade the existing G-O road; all of that reconstruction has been completed with the exception of the six-mile segment at issue here, which will connect the completed halves of the road. The road would improve access to the area for recreational purposes; increase competition for federal timber contracts; transfer employment to Del Norte County, thereby alleviating unemployment created in part by other federal actions; and improve the efficiency of the administration of the area by the Forest Service. See J.A. 95, 100-101, 103, 220-222; Gov't Exh. G at 8, 53-56; Tr. 1258-1259, 1332-1335. These benefits are sufficient to establish the reasonableness of the Forest Service's decision to complete the road.<sup>36</sup>

Indeed, the government interests supporting construction of the road have been strengthened as a result of the 1984 wilderness designation of the surrounding area. One effect of that designation is that the unpaved portion of the road is now effectively closed to vehicular traffic. See pages 11-12, *supra*; 16 U.S.C. 1133(c) (use of motor vehicles prohibited "except as necessary to meet minimum requirements for the administration of the area"). Thus, the choice is not between a completed road with an unpaved section and a fully paved through road. It is between a paved road <sup>and</sup> no through road at all. We submit that the government interest in preserving a road through this area of the forest is sufficient to satisfy the applicable constitutional standard.

<sup>35</sup> This Court should not consider on this record the merits of respondents' challenges to the management plan because that plan was adopted prior to the 1984 wilderness designation, which bars timber harvesting and road construction in a significant portion of the area covered by the plan. The proper course is to allow the Forest Service to reconsider the plan in light of the 1984 designation.

<sup>36</sup> The district court's rejection of those interests was principally based upon its conclusion that they were not sufficiently weighty to

## CONCLUSION

The judgment of the court of appeals should be reversed in pertinent part and the case remanded for further proceedings (see Pet. 26-28).

Respectfully submitted.

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satisfy the compelling interest standard. See Pet. App. 66a-67a. Thus, it found that construction of the road would not make forest administration "significantly more efficient" and that the Forest Service's interest in increased efficiency "cannot justify infringement" of respondents' free exercise rights (*id.* at 68a). It found the proof of greater competition for federal timber contracts "too speculative" to "provide the basis for denying [respondents'] free exercise claim" (*ibid.*). And it stated that "increased recreational access to the area as a result of construction of the Chimney Rock Section cannot support infringement of [respondents'] First Amendment rights" (*id.* at 67a). Of course, our primary submission—that respondents' free exercise rights are not burdened here—obviates any need for these inquiries. Beyond that, we think it clear that a contrary conclusion would be required by application of a proper test of reasonableness.

**RESPONDENT'S**

**BRIEF**



(13)  
No. 86-1013



In The  
**Supreme Court of the United States**  
October Term, 1987

—○—  
RICHARD E. LYNCH,  
SECRETARY OF AGRICULTURE, *et al.*,  
*Petitioners,*

v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*,  
*Respondents.*

—○—  
ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

—○—  
BRIEF FOR THE INDIAN RESPONDENTS

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## QUESTION PRESENTED

Whether the construction of a six mile section of road through an area of land on the Six Rivers National Forest and the logging of that same area impermissibly infringes upon the right of the Yurok, Karok, and Tolowa Indians to freely exercise their traditional religion when the Indians have shown that the area is central and indispensable to their religious practices and that the proposed actions would seriously interfere with or impair those religious practices and the government has failed to show an overriding governmental interest.

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No. 86-1013

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In The  
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RICHARD E. LYG,  
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*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF FOR THE INDIAN RESPONDENTS

---

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

*United States Constitution, Amendment I:*

“Congress shall make no law respecting an establish-  
ment of religion, or prohibiting the free exercise thereof  
. . . .”

*American Indian Religious Freedom Act*, Pub. L. No. 95-  
341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C.  
§ 1996), set forth in the Appendix at the end of the brief.

## STATEMENT

Indian respondents are northwestern California Indians who seek to protect from governmental interference their fundamental right to freely practice their traditional religion. For generations, the Yurok, Karok, and Tolowa tribes have held sacred a remote, rugged area of land, now located within the Six Rivers National Forest. The area is their most holy site and has been continuously used by them for generations for religious practices, which form the very core of their traditional religious belief system. The United States Forest Service proposed to construct a section of road through this area and to log its timber.<sup>1</sup> Respondents filed suit, maintaining that these proposed actions, unless enjoined, would seriously interfere with their religious practices.

The district court found that the area constituted the center of the spiritual world for these three Northwestern California Indian tribes, and that the Indians' use of the area was central and indispensable to religious practices that are at the core of these tribes' religious belief system. The district court found that the Forest Service proposals would seriously interfere with these practices and posed a very real threat of undermining the tribal communities and religious practices as they exist today. Because it found no overriding governmental interest for the proposals, the district court held that the proposals would deny the Indians the free exercise of religion guaranteed by the First Amendment. The court of appeals affirmed.

1. Congress has since made the major portion of the area a part of the Siskiyou Wilderness, thereby precluding most of the proposed logging. Construction of the road through the area is not precluded by the Wilderness Act. See page 20, *infra*.

## A. Indian Respondents' Religious Practices

Respondent Jimmie James is a full-blooded Yurok-Hupa Indian, born in 1914 near the mouth of the Klamath River on the Hoopa Valley Indian Reservation. Tr. 55; J.A. 8. Respondent Sam Jones is a full-blooded 74 year-old Yurok from the Hoopa Reservation, born and raised in the village of Weitchpec on the Klamath River. Tr. 236; J.A. 9. Respondent Christopher H. Peters is a Yurok-Karok Indian, born in 1949, also from the Hoopa Reservation. Tr. 69; J.A. 10. Lowana Brantner, a Yurok who was a party to this action but died during the course of its appeal, was born in 1908 at the Klamath River village of Mettah on the Hoopa Reservation. Tr. 226; J.A. 9. Respondent Northwest Indian Cemetery Protective Association is a non-profit organization dedicated to protecting Indian burial grounds, ceremonial sites, and areas of religious, cultural and historical significance to Indians of Northwest California. J.A. 7. Its membership is comprised of Tolowa, Yurok, Karok and other Northwest California Indians. *Id.* at 8.

Individual Indian respondents believe in the native religious belief system shared by their tribes and have throughout their lives participated in the traditional rites and ceremonies that are a part of this religious system. The government does not challenge the sincerity of the Indian respondents' beliefs or the fact that they are "rooted in religious belief." Pet. App. 58a, 62a; *see also* Government's Brief (hereinafter "G.B.") at 2-4, 20-21.

At trial, numerous individual Indian practitioners testified concerning their indigenous religious beliefs and practices, including all of the individual Indian respondents.



Tr. 55-124, 226-242. In addition, several anthropologists testified as expert witnesses in support of respondents' position, including Dr. Joseph Winter (Tr. 177-225), Dr. Dorothea Theodoratus (Tr. 125-142, 175-176), and Dr. Arnold Pilling. Tr. 242-282. Documentary evidence was introduced as well, most notably the 450-page ethnographic, historic, and archaeological research study entitled "Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest" (hereinafter referred to as "Theodoratus Study"), conducted under contract with the Forest Service by Dr. Dorothea Theodoratus and Dr. Joseph Chartkoff and Ms. Kerry Chartkoff. Def. Ex. G, Appendix K; Tr. 50-A, 175 (portions of the study are reprinted at J.A. 110-197). The evidence on the Indian respondents' religious beliefs and practices, which is uncontroverted, may be summarized as follows.

The historical territory of the Yurok, Karok, and Tolowa Indians covers the region where the Six Rivers National Forest is presently located. Pl. Ex. 2; Tr. 51; Theodoratus Study, 18-19. The Hoopa Valley Indian Reservation is located in this territory and is adjacent to the Six Rivers National Forest.

Within the northeastern corner of the Six Rivers National Forest is located an area of land known as the "high country,"<sup>2</sup> which the Yurok, Karok, and Tolowa Indians consider sacred. Pet. App. 57a; J.A. 187-190, 256-259, 272-276. To respondents and their fellow tribal

2. Based upon the testimony at trial and the Theodoratus Study, the high country is described by specific land sections in the district court's order. Pet. App. 90a.

members, the sacred high country is their "church." J.A. 257, 258, 275. It is their most holy place: their "Mecca" (J.A. 272-273); no other area possesses equivalent religious significance for these people. Pet. App. 64a; J.A. 223, 266; Tr. 1401-02. They believe that this area was placed there by the Creator as the place where they could go to acquire religious powers and to communicate with the Creator; it is the home of the "Beforetime People" (woge), "Thunders," and other supernatural forces. J.A. 188, 198, 213, 256-259, 272-273. Today, as they have for generations, individual tribal members, spiritual leaders, and medicine persons use the high country for rituals and ceremonies central to the Northwestern Indian religious belief system. Pet. App. 58a, 64a; J.A. 111-182, 187-190, 213, 256-259, 272-276.

The high country, with its attributes of remoteness and wilderness, is an integral and indispensable part of the Yurok, Karok, and Tolowa religious beliefs and practices (J.A. 180-182, 258-259), and is an essential part of the exercise of the religious complex generally called World Renewal. Pet. App. 64a; J.A. 111-118. World Renewal ceremonies, such as the major ceremonies known as the White Deerskin Dance and the Jump Dance, involve a number of specific functionaries and possess particular characteristics of form and setting (J.A. 112); they are performed at the sites where the pre-human spirits are said to have first brought certain gifts to man. J.A. 115. The spiritual leaders who preside over these ceremonies are initially trained in the high country and must return periodically to the sacred area for a variety of religious purposes, including the quest for the spiritual (medicine) power

needed to conduct the World Renewal ceremonies. Pet. App. 58a; Tr. 248-249. The power brought back by the spiritual leaders is combined in a collective effort of uniform prayer by the 300-400 participants who are in attendance at the particular religious ceremony. Tr. 109-113, 122-124; J.A. 113-114.

The entire indigenous religious community, which numbers approximately 4,500, relies on these ceremonies and on the ability of the spiritual leaders to use the high country to train and obtain the power needed to make the ceremonies meaningful and efficacious. Tr. 112-20; J.A. 147, 189, 259, 264-265.

The high country is essential also for the performance of healing rituals which are a part of this traditional religious system. Pet. App. 58a; J.A. 120-123, 161; Tr. 237-238. Medicine women must be trained in the high country for their doctoring roles and must travel back periodically to pray, to obtain spiritual power, and to gather medicines. They then return to the tribal communities to administer to the sick the healing power gained in the high country through ceremonies such as the Brush Dance and Kick Dance. *Id.*

In addition, individual tribal members who believe that they have been called to the sacred area by the Creator make private pilgrimages to the high country for prayer, divine guidance, and in quest of personal "power" for individual achievements and concerns, for example, to restore health. Pet. App. 58a, 64a; Tr. 79, 240-241; J.A. 131-132.

The sacred area is used not only in the training and pre-ceremonial preparation by the spiritual leaders (J.A.

118-119), but also serves literally as the training ground for the young people of the tribes to learn their tribe's traditional religious beliefs and ceremonies. This training is necessary to preserve and convey such practices to future generations.<sup>3</sup> Pet. App. 64a; J.A. 259.

While practitioners use "prayer seats" located on focal sites such as Doctor Rock, Chimney Rock, or Peak 8, as part of their rituals, the religious use of the area is not confined to these prayer seats. Pet. App. 57a-58a; Tr. 58-59; J.A. 147-150, 193-194. Rather, the area as a whole is considered sacred and a generalized religious use is made of the area as a whole. *Id.* In addition to the identified principal power sites, the sacred area is dotted with a multitude of tseltsels (seats), sacred sites and locales, rock cairns, and trails, such as the Golden Stairs Trail, all of which constitute part of the generalized religious use made of the area. J.A. 153-177; Theodoratus Study at 413. This generalized use results from the fact that within the Indian respondents' religious belief system locales such as Doctor Rock, Chimney Rock and Peak 8 form a geographic hierarchy of power which is correlated with the progress of an individual practitioner's quest for spiritual power through the high country. J.A. 148-149, 156-178, 188. A seeker of power travels and progresses through sites of increasing power and aspires to use the most powerful locales. *Id.*

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3. A period of preparation, involving fasting, praying, and purification rituals, which may extend up to ten days, precedes a journey into the sacred area for religious purposes. J.A. 132-133. Once the individual receives a sign from the spirits recognizing his sincerity for the quest for power and sanctioning that quest, the individual can enter the high country at a walk or at a run, selecting the trail appropriate for the type of medicine or power the individual seeks and the individual's abilities. J.A. 133-134.

The pilgrimages to the high country and the ritual activities associated with them are at the core of north-west California Indian religious beliefs and practices. Pet. App. 64a; J.A. 193-198; Tr. 83. The high country as an integral area maintains its sanctity and continues to perform its function in the religious practices of the Yurok, Karok, and Tolowa Tribes because it has remained relatively pristine and undisturbed. Pet. App. 64a; J.A. 181, 193-194, 208-213, 260.

The practices conducted in the high country are intensely private experiences. J.A. 134-135, 147, 208-209. Privacy during the power quests is required for the practitioners to maintain the purity needed for a successful journey. J.A. 134-135. As explained by one of the earlier Forest Service studies, "the emphasis on extreme privacy in making medicine in the High Country suggests that the very remoteness of the district was one characteristic which suited it to use as a spiritual precinct. Such privacy was demanded not only to protect the practitioners from interference, but to protect the innocent intruder from ritual contamination as well." J.A. 208-209.

As the government concedes (G.B. 4, 13), the pristine visual and aural conditions presently found in the high country are necessary requirements for the medicine quests undertaken in the sacred area.<sup>4</sup> Pet. App. 64a; J.A. 181,

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4. The practices conducted in the high country entail intense meditation and require the practitioner to achieve a profound awareness of the natural environment. J.A. 119-120, 210-211, 275. Prayer seats are oriented so there is an unobstructed view, and the practitioner must be surrounded by undisturbed naturalness. J.A. 154-155. The success of the quest depends upon the practitioner being able to enter into a trance in which visions and phantasmic sounds may be received as signs from the spirits that the quest for power has been granted. J.A. 122, 135, 208-212, 256.

193-194, 260. The district court found that construction of the Chimney Rock Section of the Gasquet-Orleans (G-O) Road would seriously interfere with the religious practices in the high country. Pet. App. 63a-64a.

## **B. The Government's Proposed Actions**

1. *The G-O Road.* In 1977, the Six Rivers National Forest issued a draft environmental statement describing a proposed road construction project it called the Chimney Rock Section of the Gasquet-Orleans (G-O) Road, which would replace an existing dirt road and connect two paved sections of road from the towns of Gasquet and Orleans, California.<sup>5</sup> The route preferred by the Forest Service would directly traverse the religious use area described above, "separat[ing] Chimney Rock to the north from Peak 8 and Doctor Rock to the south" (Pet. App. 59a), and bring an average of 168 vehicles a day, including 76 logging vehicles, 84 administrative vehicles and 8 recreational vehicles, into the sacred area. Pet. App. 59a; Def. Ex. G at 34.

In addition to numerous variations of a route within the Chimney Rock Corridor (the high country), the Forest Service considered several alternative routes, including two alternative routes outside the Chimney Rock Corridor,

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5. Although the Forest Service has throughout the years upgraded a series of unpaved roads that previously existed as trails or logging roads in the region between the two towns, no set route for a road to connect the two towns has ever been selected. Instead, as the draft environmental statement explains, the Forest Service has made its decision on whether, or where, to undertake any further improvement on a route between the two towns only after preceding sections have been completed. Def. Ex. E; Tr. 50A; at 16.



and a no-project alternative. The Final Environmental Statement ultimately rejected the alternatives outside of the Chimney Rock Corridor based on their greater costs. Pet. App 74a.

While the Forest Service was considering which route it would select, Congress enacted the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996) (reprinted at App., *infra*, 1a-3a). By this Act, Congress made a legislative finding that the First Amendment has not always worked well to protect the religious freedom of Indian people because federal officials "have simply been unaware of the nature of traditional native religious practices and, consequently, of the degree to which their agencies have interfered or restricted such practices." S. Rep. No. 95-709, 95th Cong., 2d Sess. 4 (1978). Congress therefore directed that federal lands be managed so as to accommodate traditional Indian beliefs and practices in order to assure the Indians' freedom of religion. *Id.*

Because several previous Forest Service studies had revealed that the Chimney Rock Corridor area played an important role in the religious beliefs and practices of the region's Indians, the Forest Service commissioned a comprehensive study of the Indians' religious use of the area before making a final decision. J.A. 110-197. The Theodoratus Study was commissioned by the Forest Service expressly to provide definitive information on the impacts that construction of the road through the high country would have upon the Indian religious practices.<sup>6</sup> Theodoratus Study at 3; J.A. 224.

6. The Theodoratus study team consisted, in addition to Dr. Dorothea Theodoratus, Dr. Joseph Chartkoff and Ms. Kerry

(Continued on following page)

The study documented the nature of the religious practices conducted in the high country, the importance of the area to the Indians' religious belief system, and the impacts the construction would have on the religious practices and on the indigenous community as a whole. It concluded that the proposed construction would seriously interfere with and irreparably impair the ability of the Indians to continue to practice their religion and would adversely affect the Indian community as a whole. J.A. 193-197. The study concluded that "[i]ntrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of the Northwest [Indian] religious beliefs and practices." J.A. 193. The study further concluded that the impact on the Indians' religion and on the tribal communities would be sufficiently great so as to justify the rejection of any route through the sacred area. J.A. 197. In addition, the study recommended that

The Blue Creek area remain environmentally pristine in every respect, to insure appropriate access and use by Native American practitioners. It is only by such actions that the beliefs and practices of these Native American cultures can be protected and granted the freedom of expression necessary for their survival. J.A. 197.

(Continued from previous page)

Chartkoff, of twenty members who spent a year reviewing all previous studies and other literature, conducting field investigations, and conducting interviews of 166 Yurok, Karok, and Tolowa Indians of the area. Theodoratus Study at 4, 7-9. Dr. Joseph Winter, Forest Archeologist for the Six Rivers National Forest, evaluated the Theodoratus Study and found it to be a sound and professional analysis of high methodological quality; he concurred with the conclusions of the report. Def. Ex. F; Tr. 50A (portion of Dr. Winter's report is reprinted at J.A. 198-200); see also Tr. 178-188.

In 1981, the Secretary of the Interior listed on the National Register of Historic Places an area of land totaling 13,500 acres and generally encompassing the high country. Pet. App. 85a. The area was listed as the "Helkau District" pursuant to the National Historic Preservation Act, 16 U.S.C. § 470a, in recognition of its ancient and continuing religious value to the Yurok, Karok, and Tolowa Indians. Pet. App. 85a; J.A. 224-225. On January 29, 1982, after a public hearing, on-site inspections, and review of Forest Service documentation (Tr. 1404-1405), the Advisory Council on Historic Preservation, "the expert regulatory body concerned with preserving, restoring, and maintaining the historic and cultural environment of the Nation" (*Preservation Coalition v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982)), found that construction of the road through the high country (Helkau District) would have "devastating effects on an historic property of great cultural value to the native peoples of the area." J.A. 205. The Council determined that it "[could] not sanction a project whose planning has been so badly segmented as to hardly constitute planning at all," and recommended that the Chimney Rock Section of the G-O Road not be constructed and that the Forest Service proceed to explore alternative routes. J.A. 205.

Nevertheless, on March 2, 1982, the Regional Forester selected the route through the sacred area as the proposed route for the road. Pet. App. 4a, 56a, 59a. The interests that the government asserted would be served by construction of the Chimney Rock section included increasing access to the timber in the area, stimulating employment in the regional timber industry, increasing recreational

access, furthering efficient administration of the area, and potentially increasing the price of bids on future timber sales by reducing hauling costs to mills located in Del Norte Country. Pet. App. 66a; Tr. 1258-1259; G.B. 5.

As is more fully explained below, the district court found, after extensive testimony, that completing the road as proposed would in fact do little, if anything, to further these objectives. Pet. App. 66a-68a.

2. *Logging.* Around the same time period as the Forest Service was considering the road project, it designated some 96,500 acres in the Gasquet and Orleans Ranger Districts of the Six Rivers National Forest as the Eight-mile and Blue Creek Planning Units, respectively, and began to prepare a single multiple-use management plan and environmental impact statement for management of these lands. Pet. App. 3a. The Blue Creek Planning Unit consisted of approximately 67,500 acres, which included approximately 31,000 acres of undeveloped area. Pet. App. 54. The sacred high country is located within the northeastern corner of this area. Pet. App. 3a, 57a.

In 1976, the Six Rivers National Forest supervisor adopted a land use management plan that provided for extensive commercial harvesting of the timber in the Blue Creek Unit. In June 1981, the forest supervisor issued an Implementation Plan for the Blue Creek Unit that implemented the land use management plan with certain modifications. The modifications included a reduction in the amount of timber to be cut, and proposed protective zones around Chimney Rock, Doctor Rock, Peak 8, and some of the other religious sites. Pet. App. 59a. The 1981 Implementation Plan called for the logging of 775 million

board feet of timber from the Blue Creek Unit, including the high country, over an 80-year period (Pet. App. 55a), and the construction of approximately 200 miles of logging roads in the areas immediately adjacent to the religious sites described above.<sup>7</sup> Pet. App. 59a.

As described below, the district court found that implementation of this plan would seriously impair the Indians' use of the high country for religious practices. Pet. App. 63a.

### C. The District Court's Decision

After exhaustion of administrative remedies, two suits were filed challenging the Forest Service decisions to implement the Blue Creek land use plan and construct the road section through the high country: *California v. Block, et al.*, brought by the State of California (J.A. 47-66), and *Northwest Indian Cemetery Protective Association, et al. v. Petersen, et al.*, brought by Indian respondents and several conservation organizations and individual members of those organizations.<sup>8</sup> J.A. 5-46.

7. Prior to this decision, the Forest Service had managed the undeveloped area essentially as wilderness. See Pl. Ex. 46; Tr. 1195-1196. That is, the Forest Service maintained the area in its natural condition in order to protect fish habitat, scenic values, and opportunities for primitive recreational experiences. Commercial timber cutting and road-building were prohibited. *Id.*

8. Because the Forest Service has sought review solely of the free exercise of religion issue, the conservation respondents are not participating before this Court, although they remain interested parties as members of the public who use the area for non-religious purposes.

These suits alleged, among other things,<sup>9</sup> that the challenged decisions would violate the First Amendment of the Constitution of the United States and the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996. The district court denied respondents' motion for preliminary relief and instead chose to proceed with an early trial, based upon the assurance from the Forest Service that no construction would occur prior to a ruling on the merits. Pet. App. 56a.

Based upon the evidence presented at a ten-day trial, the Court held that the challenged Forest Service decisions violated (1) the First Amendment of the Constitution of the United States; (2) NEPA and the Wilderness Act; (3) the Federal Water Pollution Control Act; (4) Indian water and fishing rights on the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights; and (5) the Administrative Procedure Act. Pet.App. 56a-57a.

With regard to the First Amendment, the district court found that "[t]he evidence establishe[d] that construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indian plaintiffs' use of the high country for religious

9. Other claims alleged violations of: (1) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (2) the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; (3) water and fishing rights reserved to the Indians of the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights; (4) the Administrative Procedure Act, 5 U.S.C. § 706; (5) the Multiple Use Sustained-Yield Act, 16 U.S.C. §§ 528-31; and (6) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*



practices." Pet. App. 63a. It found that for generations, Yurok, Karok, and Tolowa Indians have traveled to the high country to communicate with their Creator, to perform rituals, and to prepare for specific ceremonies (Pet. App. 58a, 64a), and that this use of the high country is essential to performing major religious ceremonies that constitute the heart of these tribes' religious belief system. *Id.* The district judge further found that the Indians' use of the high country "in training young persons in the tribes in traditional religious beliefs and ceremonies is necessary to preserve such practices and to convey them to future generations," and that "[d]egradation of the high country and impairment of such training would carry 'a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today.'" Pet. App. 64a.

The court further found that the area considered sacred and used by the Indians encompassed an entire region rather than simply a group of individual sites, and that no other geographic area held equivalent religious significance for these tribes. Pet. App. 57a, 64a.

Based on these findings, the court concluded that the religious use of the high country was "central and indispensable" to the Indian respondents' religion. Pet. App. 64a.

The court next found that the religious practices conducted in the high country depended upon and were made possible by the solitude, quietness, and pristine environment found in the sacred area (Pet. App. 58a, 64a), and that the religious integrity of the high country for these tribes rested on the pristine qualities of the entire area rather than on just a few individual sites. *Id.*

The court found that construction of the road section through the high country and/or the harvesting of timber

in the high country would seriously interfere with the religious practices in the high country. It found that those government actions would seriously damage the visual, aural, and environmental qualities necessary for these practices to continue (Pet. App. 64a), and noted that the Forest Service's own extensive study had concluded that the proposed intrusions were "potentially destructive of the very core of Northwest [Indian] religious beliefs and practices." *Id.* at 65a.

Noting that the unorthodox character of the religious beliefs involved in this case did not deprive them of the safeguards contained in the Free Exercise Clause (Pet. App. 62a-63a), the district court found that the challenged actions burdened the Indian respondents' right to the free exercise of religion. *Id.* at 63a-65a.

The court observed that the few existing court decisions concerning site-specific Indian religious claims, as well as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), supported the conclusion that in this case the Indians had demonstrated a burden on their free exercise rights. Pet. App. 65a.

Using this Court's standard that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" (Pet. App. 60a), the district court carefully examined the evidence concerning the interests the Forest Service stated would be served by the proposed actions. After reviewing several days of testimony by numerous government witnesses as to the putative benefits of the road, the court found that those interests would either not be served by the proposed project, were too speculative, or fell far short of constituting the paramount interests

necessary to justify infringement of the Indians' freedom of religion. Pet. App. 66a-68a.

The district judge found that construction of the Chimney Rock road section "would not improve access to the timber resources in the Blue Creek Unit," which the Forest Service had conceded could already be harvested without construction of the proposed section of road. Pet. App. 66a-67a. The court found that completion of the road "would result in no net increase in the number of jobs in the regional timber industry"; the most it would accomplish would be the transfer of certain jobs from one county to another county. *Id.* at 67a. The court also found that "[r]ecreational access to the area currently exists," and that "an average of only eight vehicles per day would use the road for recreational purposes." *Id.* Moreover, the court found that the road construction would result in "environmental degradation" that would "decrease the area's suitability for primitive recreational use." *Id.* The court further found that the testimony established that "the Forest Service is currently able efficiently to provide all needed administrative services to the Chimney Rock-Doctor Rock area," and that construction of the road would not greatly improve such administration. *Id.* Finally, it expressly found that past investment of resources in previously paved sections of road did not justify construction of the Chimney Rock Section because the existing sections of road have independent utility, providing "improved and useful access to vast recreational, timber, and other resources in the region."<sup>10</sup> Pet. App. 68a.

10. As noted in the government's brief, part of the "G-O" Road is not located on the Six Rivers National Forest, but rather is an existing road maintained by the County of Del Norte to access that part of the county. G.B. at 5.

Regarding the management plan, the district court found that the Forest Service had shown neither a compelling interest in harvesting the timber in the high country,<sup>11</sup> nor that the proposed plan was the least restrictive alternative for harvesting the timber in the Blue Creek Unit. Pet. App. 68a-69a.

Based upon these factual findings, the district court held that the proposed actions, if carried out, would impermissibly impinge upon the Indians' First Amendment right to freely exercise their religion and enjoined the Forest Service from constructing the Chimney Rock section of the G-O road through the high country and from engaging in commercial timber harvesting and constructing logging roads in the high country.<sup>12</sup> Pet. App. 90a.

11. The district court found that the timber in the high country is but a small fraction of the timber resources found in the entire Six Rivers National Forest, and that its harvesting would not significantly affect timber supplies or the regional timber industry. Pet.App. 68a-69a.

12. The district court found additionally that the environmental impact statements on the road and the land use management plan failed to satisfy the requirements of the National Environmental Policy Act and the Wilderness Act. Pet.App. 75a-85a. Because the proposed projects would result in as much as a 500% increase in sediment loads in Blue Creek (Pet. App. 76a) and adversely affect fish spawning habitat, the district court also found a violation of the Federal Water Pollution Control Act and Indian fishing rights (Blue Creek provides a significant portion of the anadromous fish production of the Klamath River, which flows through the Hoopa Valley Indian Reservation). *Id.* at 86a-88a. Accordingly, the district court also enjoined the Forest Service from engaging in commercial timber harvesting and/or from constructing any logging roads in any part of the Blue Creek Unit until the Forest Service prepares an adequate environmental impact statement and completes studies demonstrating that those activities would not violate the Federal Water Pollution Control Act, and would not reduce the supply of anadromous fish in the Klamath River. Pet. App. 90a-91a.

#### D. Passage of the California Wilderness Act

While the case was pending before the court of appeals, Congress set aside most of the undeveloped area of the Blue Creek Unit, including most of the high country, as wilderness. See California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 *et seq.*; see also Pet. App. 5a-6a. Because wilderness designation prohibits commercial activities and permanent roads (16 U.S.C. § 1133(c)), most of the timber harvesting within the high country enjoined by the district court is now prohibited by the California Wilderness Act. Pet. App. 6a. Wilderness designation, however, does not preclude the Forest Service from continuing to use the existing unpaved road for administration of the area. 16 U.S.C. § 1133(c).

In permanently setting aside this area as wilderness, Congress expressly recognized the area's "critical importance to Native Americans for cultural and religious purposes." H.R. Rep. No. 98-40, 98th Cong., 1st Sess. 32 (1983); S. Rep. No. 98-582, 98th Cong., 2d Sess. 28-29 (1984).

While Congress left a 1,200 foot-wide corridor through the new Siskiyou Wilderness for possible construction of the G-O Road, it expressly made clear that by doing so it was making no judgment on or adopting any position with regard to the merits of that project, but was merely recognizing that a controversy existed. See H. R. Rep. No. 98-40, 98th Cong., 1st Sess. 32 (1983); S. Rep. No. 98-582, 98th Cong., 2d Sess. 29; 130 Cong. Rec. No. 113, 18-19 (H. Rep. Sept. 12, 1984) (remarks of Cong. Seiberling).<sup>13</sup>

13. Congressman Seiberling, Chairman of the House Subcommittee on Public Lands and National Parks which produced  
(Continued on following page)

#### E. The Court of Appeals' Decision

On June 24, 1985, the court of appeals issued a decision affirming the district court decision in part and vacating in part. Pet. App. 38a-52a. The Forest Service filed a petition for rehearing and suggestion for rehearing en banc. On July 22, 1986, the court of appeals granted the petition for rehearing, withdrew its previous opinion, and issued a new opinion. Pet. App. 1a-37a. In its comprehensive opinion issued on rehearing, the court of appeals again affirmed the district court in all respects except the wilderness claim and the Indian fishing rights claim, which parts it vacated.<sup>14</sup> Pet. App. 1a-37a.

Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963), the court of

(Continued from previous page)

this legislation, pointed out on the floor of the House that House Rep. 98-40 "should be specifically consulted with reference to certain agreements, boundary descriptions, or instructions to the Forest Service which are part and parcel of the consensus reached with the Senate on this bill, but which do not appear in the Senate Committee report." 130 Cong. Rec. No. 113, 18 (H. Rep., Sept. 12, 1984). One of these "agreements" or "boundary descriptions" was the G-O Road corridor within the Siskiyou Wilderness, with respect to which Congressman Seiberling stated:

"Siskiyou Wilderness: House proposal reduced from 191,000 to 153,000 acres by dropping Dillon Creek and the east fork of Blue Creek; corridor left for G-O road project, but only if it is determined permissible under other laws . . ."

*Id.* at 19 (emphasis added).

14. The court of appeals found, as it had in its prior opinion, that the wilderness claim had been rendered moot by the California Wilderness Act. Pet.App. 20a. The court of appeals also concluded that this case was not an appropriate vehicle in which to rule on the Hoopa Valley Indian Reservation fishing rights claim. Pet. App. 19a-20a n.10.



appeals first reiterated the standard applicable to a free exercise claim: "The first amendment prohibits governmental actions that burden an individual's free exercise of religion unless those actions are necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner." Pet. App. 6a-7a.

To determine if Indian respondents had demonstrated that the government actions burdened their free exercise rights, the court adopted the inquiry used by the district court, and by the other circuit courts that had addressed similar site-specific Indian religious claims: "The Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs, and that the proposed governmental actions would seriously interfere with or impair those religious practices." Pet. App. 7a.

The court of appeals agreed with the district court that the proposed operations would interfere with the Indians' free exercise rights. Pet. App. 8a. The court found that the record amply supported the trial court's conclusion that the high country is indispensable and central to the Indians' religious practices. *Id.* at 9a. In this regard, the court stated:

There is a great deal of evidence in the record that the high country is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the "power" that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use. Finally, there is much evidence that the religious lives of many other Indians depends upon the services of those leaders who have received the necessary "power" in the high country. On all these points, there is virtually no evidence to the contrary.

Pet. App. 9a (footnotes omitted).

The court also concluded that the proposed governmental actions would seriously interfere with the Indians' religious practices (*id.* at 9a-10a), noting: "The record also amply supports, indeed virtually compels, the conclusion that logging and the construction of logging roads would be utterly inconsistent with the Indians' religious practices." Pet. App. 9a.

Relying upon the evidence in the record, and particularly upon the Forest Service's own report (which the court noted "was not at all equivocal about the Road," *id.* at 10a), the court concluded that the Indian respondents had demonstrated that the road would interfere with the free exercise of their religion. *Id.*

The court of appeals rejected the government's general and unsupported allegation that its prerogative to manage the forest in the usual way, within its statutory authority, was a sufficient justification supporting infringement upon the Indians' religious rights. Pet. App. 14a. In doing so, the court pointed out that the government did not take issue with the balancing test adopted by other circuit court decisions on similar claims, which requires that once the Indians meet their burden of showing infringement on their rights, the government must show that the actions at issue serve a compelling interest. As observed by the court "[i]n these cited cases, the Indian plaintiffs did not prevail. But inherent in the adoption of a balancing test is the distinct possibility that, on a different record, the Indians may prevail." Pet. App. 15a.

The court then examined the record before it and agreed with the district court that the government's evi-

dence had fallen short of demonstrating the overriding interest required to justify its proposed interference with the Indian respondents' free exercise rights.<sup>15</sup> Pet. App. 15a.

On rehearing, one member of the appeal panel dissented in regard to the First Amendment claim. In his dissenting opinion, Judge Beezer agreed with the standard adopted by the majority to be applied when Indian religious claims relative to the use of public lands are raised, namely, the two-step analysis that requires the Indians first to show that the area is central and indispensable to their religious practices and that the threatened activity would seriously interfere with or impair those practices; and, if that burden is met, requires the government to show an overriding interest that cannot be served through less restrictive alternatives. Pet. App. 24a-25a.

Judge Beezer noted that although some courts have been reluctant to recognize First Amendment rights of Indians in specific sites because Indian religious concepts differ substantially from Judeo-Christian concepts, "[i]t is well settled, however, that Indians have standing to raise first amendment objections to the development of public lands" and that "[t]he district court properly concluded that the Indian plaintiffs have a first amendment interest in the high country." Pet. App. 28a n.2 (cites omitted).

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15. The court of appeals also upheld the district court's findings that the environmental impact statements were inadequate under the National Environmental Policy Act (Pet. App. 15a-18a), and that the Forest Service projects would violate applicable water quality laws. *Id.* at 18a-19a. The Government chose not to petition for certiorari on these issues.

Judge Beezer, however, concluded that the district court had made inadequate findings regarding the effects of the construction of the road. Pet. App. 29a. He therefore independently reviewed the evidence and disagreed with the district court and with the majority of the court of appeals panel that the Indians had shown that completion of the road would seriously impair the practice of their religion. *Id.* at 29a-34a. In regard to timber harvesting in the high country, Judge Beezer would have remanded for reconsideration in light of the passage of the Wilderness Act.

The government presents only the constitutional issue for review and does not challenge the statutory bases for the district court's injunctions.

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### SUMMARY OF ARGUMENT

The district court found that the construction of the Chimney Rock Section of the G-O Road through the high country will seriously impair the exercise of the Indian respondents' religion and poses "a very real threat of undermining the tribal communities and religious practices as they exist today." Pet. App. 63a-64a. The Forest Service's own experts concluded that the proposed governmental action is "potentially destructive of the very core of Northwest [Indian] religious beliefs and practices." Pet. App. 65a. Moreover, the Advisory Council on Historic Preservation, the federal agency charged with preserving the historic and cultural foundations of the Nation, pursuant to the National Historic Preservation Act, 16



U.S.C. § 470i, found that the road would have “devastating effects on a historic property of great cultural value” and concluded that it was “fundamentally wrong” to so seriously impact the Indians’ religion. J.A. 202, 205.

Nevertheless, the government asserts that the First Amendment is not legally implicated in this case. The government relies on a “crabbed interpretation [of the Free Exercise Clause] that robs [that] provision of its full, fair and reasonable meaning,” *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring), and robs the Indians of their fundamental religious freedom. The government argues that, although the government actions admittedly infringe upon important elements of respondents’ religion, no legally cognizant burden upon their religious liberty is present; and that, if a burden upon respondents’ religious rights is found, a different and lesser standard for the government’s interest should apply.

These propositions are contrary to the central values of the First Amendment and are directly contrary to the express congressional policy embodied in the American Indian Religious Freedom Act, Pub.L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996) (App., *infra*, 1a-3a). A burden upon respondents’ religious rights is present under the constitutional principles announced by this Court. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). Moreover, Congress has made a legislative finding that land management decisions can burden religious liberty and that the policy of this nation shall be to protect and preserve these traditional Indian religious practices. *See* American Indian Religious Freedom Act, *supra*. Finally,

under any analysis, a burden is present under the facts found by the district court.

Furthermore, there is no basis or reason for lessening the standard of religious protection in this case. This Court recently rejected, in *Hobbie v. Unemployment Appeals Commission*, — U.S. —, 55 U.S.L.W. 4208 (1987), the government’s argument that a reasonable rather than a strict scrutiny standard should apply in this sensitive constitutional area. None of the government’s reasons regarding its property rights are persuasive to warrant a lesser standard for this indigenous religion. Limitations on the government’s rights in public lands imposed by the First Amendment have long been recognized. *See, e.g., Shuttleworth v. City of Birmingham*, 394 U.S. 147 (1969); *Hague v. CIO*, 307 U.S. 147 (1939).

The longstanding and continuous use of the high country for First Amendment practice, and the “centrality and indispensability” of the area to the exercise of the Indians’ religion, are factual findings that implicitly weigh the government’s property interests. *See Wilson v. Block*, 708 F.2d 735, 744 n.5 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983). Moreover, a lesser standard of protection would be contrary to Congress’ express policy to protect this traditional Indian religious exercise. *See* American Indian Religious Freedom Act, *supra*.

Because the government’s land management scheme requires a case-by-case substantive determination regarding the land uses for each planning unit, which allows the administrator to choose in favor of accommodating the religious use or to choose a conflicting land use that forecloses the religious activity, a choice against the religious



use "tends to exhibit hostility, not neutrality, towards religion." *Bowen v. Roy*, 476 U.S. —, 90 L.Ed. 2d 735, 750 (1986). Therefore, it is appropriate to require the government to demonstrate a compelling reason for its action. *Id.*

The Indian respondents do not seek to extract anything from the government. They are not asking for a land subsidy or for the government to create a religious sanctuary, nor does the district court's injunction do this. Respondents ask only that the government respect their native religious beliefs and practices, which have existed since long before the federal government came onto the scene. Rather than seeking anything from the government, their only request is that the federal government not destroy their most sacred site and their religious practices that have existed for hundreds of years—a request fully in accord with the basic values of the First Amendment.

Clearly, the harm to the Yurok, Karok, and Tolowa Indians' religious liberty and cultural survival, and the nation's interest in preserving its religious diversity and freedom for all, outweigh any specific harm to society that might result if the Indian respondents' claim for religious liberty is upheld.

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## ARGUMENT

### THE FOREST SERVICE ACTIONS WOULD VIOLATE THE INDIAN RESPONDENTS' RIGHTS TO FREE RELIGIOUS EXERCISE

The First Amendment protects freedom of religion with language as complete as that found anywhere else in

the Constitution. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. Clearly, the fundamental constitutional value embodied in the First Amendment is religious freedom itself. Nothing in the language of the First Amendment supports the conclusion that the First Amendment applies only to certain governmental actions but not to others that significantly impinge upon religious freedom.

As noted by Justice O'Connor, "[e]ven if the Founding Fathers did not live in a society with the 'broad range of benefits and complex programs' that the federal government administers today, they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members." *Bowen v. Roy*, 476 U.S. —, 90 L.Ed. 2d at 765 (1986) (O'Connor, J., concurring in part and dissenting in part).

#### A. The Courts Below Correctly Found That Indian Respondents' Free Exercise Rights Would Be Infringed

The First Amendment forbids governmental interference with the free exercise of religion. This Court's free exercise jurisprudence holds that government action violates the Free Exercise Clause if it imposes a burden on the free exercise of religion unless the government establishes "a state interest of sufficient magnitude to override the interest claiming protection." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); see *Sherbert v. Verner*, 374 U.S. 398, 402-09 (1963). Furthermore, "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215. Even if the government advances such an interest, it must show that those interests cannot be

achieved in a less restrictive manner. *Sherbert*, 374 U.S. at 407-08.

1. There is no factual dispute in this case that the government's actions burden the Indian respondents' religious exercise. The district court specifically found that the government's actions would seriously impede, if not totally prevent, the observance by Indian respondents of their traditional religious practices.<sup>16</sup> Pet. App. 63a-65a. The Forest Service's own experts and the Advisory Council on Historic Preservation have both confirmed the devastating impact that the Forest Service actions would have on the Indians' religious exercise.

Despite the record, or perhaps because of the record,<sup>17</sup> the government argues that the Free Exercise Clause is not legally implicated because the government interference

16. The testimony of the several experts at trial is of note: Dr. Arnold Pilling: "... the completion of the G-O Road would be a very significant infringement upon the religious rights, the religious freedoms of a significant portion of the native American population. ..." J.A. 278. In response to the court's question whether "the completion of the six miles and consequences of that completion will have an adverse impact upon the religious practices in the area around Doctor Rock and particularly Chimney Rock," Dr. Joseph Winter, prior Forest Service archeologist answered unequivocally: "Yes, sir. The Forest Service recognized that." J.A. 269. Moreover, the government attorney at trial conceded that "up until now they [the Indians] have religious freedom . . .", but that the government's actions would be "the straw that broke the camel's back, so to speak." J.A. 277.

17. This Court has frequently recognized that "how the facts are found will often dictate the decision of federal claims." *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 416 (1964); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues").

in this case does not take the form of a regulation that either coerces an individual to engage in conduct contrary to his religious beliefs or conditions the right to a public benefit upon the compromise of religious beliefs. G.B. 21-22. This Court's rulings in the First Amendment area do not stand for the proposition that free exercise protection is available only in those two limited circumstances, and that any other form of government impingement on religious freedom, regardless of how significant, is immune from review.<sup>18</sup>

To the contrary, the general principle deducible from all that has been said by this Court is that the effect of the law on the exercise of the First Amendment right, not the form of the law, is the critical inquiry for constitutional protection. See, e.g., *Sherbert v. Verner*, 374 U.S. at 404 (if the effect of a law is to "impede observance" of a religion, that law is invalid even though the burden may be characterized as being only indirect.); *Walz v. Tax Commissioner*, 397 U.S. 664, 669 (1970) (each value judgment under the Free Exercise Clause must turn on whether the

18. As noted by the court of appeals (Pet. App. 14a-15a, 24a-25a), the circuit courts that have considered similar site-specific Indian religious claims have consistently held that the First Amendment is implicated and applied the standard balancing test. See, e.g., *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983) (First Amendment applicable, but Hopi plaintiffs failed to make factual showing that area is indispensable or central to their religious practice or that government action would seriously interfere with or impair religious practices); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981) (having found a compelling state interest, the court did not reach the issue of whether the government action infringed Navajo plaintiffs' religious exercise); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980) (Free Exercise Clause applicable, but Cherokee Indians failed to show religious use of area).



particular governmental acts in question interfere with religious beliefs and practices or have the effect of doing so).

Thus, the safeguards of the Free Exercise Clause do not depend upon the form or nature of the government's interference, but rather constitutional protection is triggered by the fact that exercise of religion is being infringed by the government. *Id.*, see also *Hobbie v. Unemployment Appeals Commission*, 55 U.S.L.W. at 4209 ("[I]nfringements [on free exercise] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest."). Just as a governmental burden on religious liberty is not insulated from review simply because it is indirect, *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981), a significant burden such as that present in this case is not insulated simply because the government's infringement does not take the form of the infringement found in prior cases. "The fact that the underlying dispute involves [a land management decision rather than] an award of benefits or an extraction of penalties does not grant the government license to apply a different version of the Constitution." *Bowen v. Roy*, 476 U.S. —, 90 L.Ed. 2d at 765.

The impact of the government's action in this case on the religious beliefs and practices of the Yurok, Karok, and Tolowa Indians, and on the tribal communities themselves, "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Wisconsin v. Yoder*, 406 U.S. at 218. Constructing the road through the heart of the Indians' religious area will compel these traditional believers to abandon a central part of their religious teachings and will have the same effect as prohibiting

these traditional practices. *Id.* Clearly, the pressure upon respondents and their indigenous communities to forego their ancient religious beliefs and practices is unmistakable. See *Thomas v. Review Board*, 450 U.S. at 717.

The present case can readily be distinguished, on both procedural and substantive grounds, from *Bowen v. Roy*, 476 U.S. —, 90 L.Ed. 2d 735 (1986). In *Roy* this Court held that the plaintiff could not, on religious grounds, prevent the government from using a social security number it had assigned to plaintiff's daughter for purposes of providing governmental benefits. As Chief Justice Burger noted: "The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." 90 L.Ed. 2d at 745.

In this case, however, the substantive burden—a threat to the continuance of the religion itself and serious interference with the ability of the Indians to practice their religion—is, under any mode of analysis, a significantly greater infringement on religious liberty than the purely informational requirement at issue in *Roy*. See Pet. App. 10a.

Moreover, this case does not involve the kind of internal governmental practices this Court found beyond free exercise attack in *Roy*.<sup>19</sup> Unlike the purely mechanical

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19. As evidenced by this very case, the government actions here are subject to public scrutiny under numerous federal statutes, including among others the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Federal Water Pollution Act, 33 U.S.C. § 1251 *et seq.*, both of which the government actions were found to violate.



practice at issue in *Roy*, this case involves a governmental management scheme that requires the federal agency to make a case-by-case substantive determination as to how a particular unit of land will be managed. And unlike *Roy*, where Congress had made the legislative determination that the social security requirement would be applicable in all cases, in this case Congress has made, relative to the traditional practices at issue, the determination that federal land managers are to accommodate Indian religious use of public lands on a case-by-case basis. See American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996) (App., *infra*, 1a-3a). Congress' determination that federal land management decisions that impinge upon traditional Indian religious beliefs and practices are subject to constitutional scrutiny would be totally frustrated if the government's actions are deemed immune from review.

2. In enacting the American Indian Religious Freedom Act, *supra*, in the exercise of its unique fiduciary relationship with the Indian people, see e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1931), Congress has made a legislative finding that federal land management decisions can and, unfortunately, often do burden Indian religious liberty.<sup>20</sup> The express intent of the Act, Congress has stated, "is to insure that the policies and procedures

20. When Congress has made legislative findings, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981); *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966).

of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." H. Rep. No. 95-1308, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Admin. News 1262, 1262; see also President's Statement on Signing Sen. Joint Res. 102 (Aug. 12, 1978) (reprinted at J.A. 248-249).

In adopting the American Indian Religious Freedom joint resolution, Congress found that federal agencies "often deny American Indians access to sacred sites required in their religions . . ." and that "traditional American Indian ceremonies have been intruded upon [and] interfered with. . . ."<sup>21</sup> Pub. L. No. 95-341; App., *infra*, at 2a. Accordingly, Congress mandated that:

21. As Representative Don Edwards, chairman of the House Subcommittee on Civil and Constitutional Rights, stated at subsequent hearings on Indian religious freedom issues:

Because of the special relationship between the Federal Government and Indians, it is incumbent upon Federal agencies to assure that the religious rights and practices of native Americans are protected and preserved. Congress specifically reminded Federal agencies of their role in guaranteeing these constitutional rights, especially when these agencies make land management decisions, at the time it passed the American Religious Freedom Act (AIRFA) in 1978. Despite these constitutional and congressional mandates, however, Federal agencies continue not only to deny native Americans access to religious sites so that they may exercise their traditional religious practices and beliefs, but also to permit the destruction or commercialization of these sites.

Hearing on Indian Religious Freedom Issues Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 1-2 (1982) (emphasis added).

it shall be the policy of the United States to protect and preserve for American Indians their inherent right to believe, express, and exercise the traditional religions of the American Indian . . . , including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rites.

*Id.*; 42 U.S.C. § 1996.

As Senator Abourezk, one of the sponsors of the resolution, explained: "a section of this resolution says it provides the freedom of worship for ceremonials and traditional rites. By having that sort of thing incorporated, you cannot deface religious objects . . . and religious sites, while it does not specifically state it, it would by implication enforce that." American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 83-84 (1978).

Section 2 of the American Indian Religious Freedom Act required the federal agencies responsible for administering relevant laws to evaluate their policies and procedures as to their impact upon traditional native religions. These agencies, which came to be known as the Federal Agencies Task Force, were to report to Congress their findings and recommend whether any further legislative action was needed to bring federal agency decisions in line with the constitutional and congressional Free Exercise mandate.<sup>22</sup> Pub. L. No. 95-341; *see also* H. Rep., *supra*, 1978 U.S. Code Cong. & Admin. News at 1264.

22. Significantly, the Federal Agencies Task Force, of which the Forest Service was a member, examined site-specific native religious practices and confirmed that "the Native people of this country believe that certain areas of land are holy" and that

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In order to assure religious freedom for such historically and culturally different religious beliefs and practices, the Federal Agencies Task Force determined that the guarantee of access to sacred sites required that:

The accommodation of Native religious uses within federal land management programs must take into account their [the Indians] desire for these lands to remain in their natural state. . . . (J.A. 251).

. . . .

Physical access to the land and its natural products must also include the preservation of the natural conditions which are the *sine qua non* of that access. The efficacy of the natural well-being of the sacred sites are dependent upon physical conditions. J.A. 254.

The Forest Service thereupon specifically assured Congress that accommodation of traditional religious beliefs and practices such as those at issue in this case could occur within its existing land management scheme: "When examination and consultation determine a need to protect and preserve certain land sites, this will be accomplished in and through the land management plan." J.A. 250.

(Continued from previous page)

there are "specific religious beliefs regarding each site which form the basis for religious laws governing the site." J.A. 252; Federal Agencies Task Force, *American Indian Religious Freedom Act Report* (1979) (portions reprinted at J.A. 227-55)). The Federal Agencies Task Force further reported that "the ceremonies and rites themselves set fairly precise rituals" (J.A. 242), and that "communal conscience requires that the ceremonies be continued as they have traditionally been constituted and practiced." J.A. 245.



3. The government suggests to this Court that the Court need not concern itself if it chooses not to apply the guarantees of the Free Exercise Clause to the Indians' religion in this case because Congress can protect the Indians' religious interests. G.B. 33-36. In effect, the government argues that religious freedom for the Indians is not for the Court to protect but for the legislature to resolve. Of course that is wrong: the judiciary is the guardian of the constitutional freedoms that have been given into its keeping. In any event, Congress has already spoken, and attempted to remind the federal agencies: traditional Indian religious beliefs and practices are guaranteed by the First Amendment. *See American Indian Religious Freedom Act, supra.*

Moreover, respondents submit that the traditional religious practices threatened in this case are entitled to protection either as a matter of constitutional law or as a matter of legislative policy under the American Indian Religious Freedom Act. As the government concedes, the statute "mandates . . . elimination of unnecessary interference with Indian religious interests." G.B. 36; *see also* pages 43-44, *infra*. The legislative history supports the conclusion that Congress intended that the Act serve as an alternative basis for protection for such practices, *see, e.g., American Indian Religious Freedom: Hearings on S. J. Res. 102 Before the Senate Select Comm. on Indian Affairs, supra*, at 135 (statement of Sen. Abourezk, one of the sponsors of the Act); and that governmental infringement upon traditional Indian religious practices must be justified by an overriding interest. *See 124 Cong. Rec. 21444 (1978).*

**B. The Courts Below Correctly Found That the Government Has Not Demonstrated an Overriding Governmental Interest**

The court of appeals and the district court properly applied this Court's standard that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see also Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). "[N]o showing merely of a rational relationship to some colorable state interest [will] suffice . . ." *Sherbert*, 374 U.S. at 406.

Unable to prevail on the specific facts of this case, the government urges this court to judge the government's interests under a "reasonableness" standard. However, as noted above, "[t]his Court's opinions have never turned on so slender a reed as whether the challenged requirement is merely a 'reasonable means of promoting a legitimate public interest.'" *Bowen v. Roy*, 476 U.S. —, 90 L.Ed. 2d 735, 764 (1986). Indeed, this lesser standard was recently rejected by this Court in *Hobbie v. Unemployment Appeals Commission*, — U.S. —, 55 U.S.L.W. 4208 (1987). "We reject the argument again today. As Justice O'Connor pointed out in *Roy*, '[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of scrutiny that the Equal Protection Clause already provides.'" *Id.* at 4209.

The notion that a lesser standard of review is warranted because the indigenous religious practice in this case implicates public property cannot withstand analysis.

1. Limitations on the government's rights in public lands imposed by the guarantees of the First Amendment



have long been recognized. See, e.g., *Shuttleworth v. City of Birmingham*, 394 U.S. 147 (1969); *Hague v. CIO*, 307 U.S. 496 (1939). Rather than providing a basis for lessening the protection for religious activity, the public forum concept supports the application of an individualized showing of a compelling interest in this case. See Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447, 1466 (1985). The sacred area in this case has been used continuously "from time immemorial" by the region's Yurok, Karok, and Tolowa Indians for religious use; indeed, the practices which are seriously threatened by the government's actions have existed at this site long before the Six Rivers National Forest was established or the government even obtained title to the land.

Because the government itself has since its acquisition managed the area for its wilderness values, the pre-existing religious uses have been allowed to continue and co-exist with the many other multiple uses of the area that do not conflict with the religious practices.<sup>23</sup> To now

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23. The Federal Agencies Task Force found that Native religious use of sacred areas is compatible with most of the purposes for which these places are now held by the federal government. J.A. 251. In this case, merely continuing to manage the sacred area as the Forest Service has up until now, which is the result of the district court's injunction, would not conflict with many of the uses for which the national forests are held. As the court of appeals noted: "The Forest Service remains free to administer the high country for all other designated purposes." Pet. App. 12a. All of the multiple uses set forth in the Multiple Use Sustained-Yield Act, 16 U.S.C. § 528, and the National Forest Management Act, 16 U.S.C. § 1600 et seq., with the exception of the proposed road construction and

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find that because the religious activity occurs on public land it merits lesser constitutional protection is without reason. Nothing in the Constitution implies such a result. Indeed, since our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), and since religious beliefs are entitled to no less First Amendment protection because they are not "traditional," see *Thomas v. Review Board*, 450 U.S. at 714, a different and lesser standard of review for the Indians' religion should not be provided merely because the beliefs of this longstanding indigenous religion center on the land itself and require site-specific practice.

The courts below appropriately focused on the historical First Amendment use made of the particular site.<sup>24</sup>

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commercial timber harvesting, remain possible; wilderness management itself is a specified multiple-use. See 16 U.S.C. § 1604 (e)(1); see also 16 U.S.C. § 529. As evidenced by the various organizational and individual co-plaintiffs in this case, who use the area for non-religious purposes and support the injunction, the district court's injunction does not create a "single-use" or an "exclusive" religious area.

24. The public forum doctrine focuses on the use of the forum—its devotion to First Amendment use by long tradition or by government fiat. Petitioner's argument that an individualized showing of a compelling governmental interest is not required because more than "access" is involved in this case is without merit. First, it is the longtime First Amendment use made of the forum that warrants the level of protection; second, it is artificial to assert that Indian respondents seek more than "access" to continue their religious practices. As the Forest Service itself, as a member of the Federal Agencies Task Force, reported to Congress, the natural qualities of the sacred site are the sine qua non of "access": "physical access to the land and its natural products must also include the preservation of the natural conditions which are the sine qua non of that access." J.A. 254.

As Chief Justice Burger noted in *Wisconsin v. Yoder*, 406 U.S. at 226-27, when a religious way of life that existed long before the government activity is threatened by the government, "a more particularized showing" from the government is needed to justify the severe interference with religious freedom.

The longstanding religious use of the area provides an additional limitation that meets the Government's concern that the court of appeals' decision in this case will open the floodgates to other "site-specific" religions surfacing on public land in the future. See 94 Yale L. J. at 1466. It is apparent from the breadth of the record in this case, and from the difficulty that other indigenous religious claimants have faced in factually meeting their burden, see, e.g., *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *Wilson v. Block*, 708 F.2d 735 (D.C.Cir.), cert. denied, 464 U.S. 956 (1983), that the analysis used by the court of appeals is indeed a stringent one that duly considers the government's ownership interests without lessening the standard of constitutional protection provided the Indians' ancient faith.

Moreover, the factors used by the court of appeals in determining whether a burden has been shown are themselves part of the calculus employed by the court in considering the government's interest in its land. Requiring Indian respondents to show, in addition to religious sincerity and serious infringement, that the particular land at issue is central and indispensable to a historical and continuous religious practice, "pay[s] due regard to the government's rights and duties in its land." *Wilson v. Block*, 708 F.2d at 744 n.5 (1983). There is simply no need to lower the standard of protection.

2. Permitting these longstanding religious practices to continue on public land is not at odds with the will of Congress. To the contrary, Congress has expressly stated that it is this nation's policy to recognize such traditional Indian religious practices under the First Amendment and to give them the protection they are entitled to under the Bill of Rights. See American Indian Religious Freedom Act, *supra*. In directing federal agencies to preserve and protect native religions, the congressional resolution itself speaks of protecting the traditional Indian religious use of sacred sites. *Id.*

As the legislative history of the American Indian Religious Freedom Act states:

It is the intent of this bill to insure that the basic right of Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration.

124 Cong. Rec. 21444 (1978) (statement of Rep. Udall, one of the sponsors of the Act).

Clearly, the "higher consideration" Congress intended was not the "government's general interests in managing its property" (G.B. 41), but rather a compelling interest demonstrated by the federal agency in a case-by-case factual inquiry.<sup>25</sup> It is equally clear that Congress

25. Congress intended that each instance of religious infringement require an individualized showing of a compelling interest, which is the touchstone of First Amendment protection:

(Continued on following page)



did not intend religion to be treated by the administrator as merely another "resource."

Thus, while Congress may have given no indication in the national forest statutes of what weight it wants assigned to such values as "outdoor recreation, range, timber, watershed, wildlife and fish," 16 U.S.C. § 528, it has expressly indicated by the American Indian Religious Freedom Act that it wants traditional Indian religious beliefs and practices to receive the priority they are entitled to under the Bill of Rights. To factor in religion as merely one value to be considered by an administrator equally with other "resource" values, as the government implies is proper, ignores not only the will of Congress but the fact that the Free Exercise Clause itself—the text of the Constitution—grants a preference to religion.

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SENATOR ABOUREZK. . . . Certainly Indians whose religious freedoms are being violated at this point could bring a lawsuit under the first amendment, couldn't they?

MR. SIMS. Yes, sir.

SENATOR ABOUREZK. He doesn't need a statute.

MR. SIMS: No, sir.

SENATOR ABOUREZK. All right. What more can this add to the Constitution except to give that particular Indian just another alternative basis for bringing a lawsuit? It is going to be decided mostly on a case-by-case basis anyhow, don't you agree?

MR. SIMS. Yes, sir.

American Indian Religious Freedom: Hearing on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 135 (1978) (exchange between Sen. Abourezk, one of the sponsors of the resolution and Justice Department Representative, Mr. Larry Sims).

3. In the government's words: "[l]and management decisions resemble a zero sum game in which the government chooses among various individual's competing claims to use particular public land." G.B. 37. Since the land management scheme allows the administrator to choose a land use that would allow the religious activity to continue or to choose a conflicting use that forecloses the religious activity,<sup>26</sup> giving lesser weight to and choosing against the land use that permits the religious practices "tends to exhibit hostility, not neutrality, towards religion." *Bowen v. Roy*, 90 L.Ed. 2d at 750. Thus, strict scrutiny is appropriate in this case. See *Hobbie v. Unemployment Appeals Commission*, 55 U.S.L.W. at 4209 n. 7.

Whatever the substantive content of the compelling governmental interest test may be, it is, like the threshold question of religious burden, factual in nature. Compelling governmental interests are not to be inferred from general or unsupported allegations but must be satisfactorily proven in each case. See *Sherbert v. Verner*, 374 U.S. at 407. Under this Court's precedents, it is incumbent upon a court faced with a religious claim to "searchingly examine" the evidence regarding the government's

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26. As the Forest Service reported to Congress, "if an issue concerning Indian religious freedom is identified . . . [and] examination and consultation determine a need to protect and preserve certain lands or sites, this will be accomplished in and through the land management plan." J.A. 250. In this case, the Forest Service ignored the central findings and recommendations of its own consultants and in-house experts, as well as those of the expert regulatory agency concerned with such historic districts and chose to develop the sacred area. If this is a "textbook example of . . . sensitive government decisionmaking" (G.B. 17), then this case itself is the best argument in favor of judicial intervention.



interests and means. *Wisconsin v. Yoder*, 406 U.S. at 221. Thus, unless credible, supporting evidence is present, claims of overriding government interests are to be rejected. *Id.*

In its detailed findings of fact, the trial court found that no overriding interest had been demonstrated for either project.<sup>27</sup> Pet. App. 66a-69a. The court further found that "means less restrictive of plaintiffs' First Amendment rights than the Management Plan exist. . . ." Pet. App. 69a. The court of appeals reviewed the record and affirmed.

The Forest Service does not challenge the court's factual findings; nor does it contend that its interests in constructing the road through the sacred area are compelling. G.B. 42. Having utterly failed to meet its evidentiary burden, the government now turns to this court for a lesser standard. Having lost its case on the facts under legal tests developed by this Court, it now wants to reverse that loss by changing the legal standard.

The government's request is not justified by the facts of this case, nor by this Court's precedents or this na-

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27. As noted, the district judge specifically found that the road would do little to meet the government's stated objectives. In any event, the primary purpose advanced by the Forest Service for the road—access to the timber of the area—was vitiated by Congress when it placed most of the area in wilderness. Contrary to the government's argument, the question does not simply boil down to whether there will be a paved road or no road, but whether the route will be through the high country. Moreover, the existing unpaved road remains available for administrative use; the rest of the G-O Road, the district judge found, serves an independent and valuable purpose. Pet. App. 68a.

tion's express policy that traditional native religions are guaranteed the same protection by the First Amendment as are other more "traditional" religions.

The harm that would be caused by the government's action to the Yurok, Karok, and Tolowa Indians, and to an irreplaceable national cultural resource,<sup>28</sup> and to other unique environmental interests of benefit to the general public would be devastating. These interests, both secular and religious, outweigh the limited public benefits, if any, which would result from constructing the road through the high country. Clearly, the Yurok, Karok, and Tolowa Indians' religious liberty and cultural survival, and the nation's interest in preserving religious freedom for all and the religious diversity of its people,<sup>29</sup> outweigh any specific harm to society that might result if respondents' claim for religious liberty is upheld.

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28. It was because of its priceless cultural value to the nation that the high country was placed as a district on the National Register of Historical Places. See J.A. 190; Theodoratus Study at 413. The Advisory Council on Historic Preservation found that the nation's interest in preserving the area and the historical religious practices which give it significance outweighs any benefits to the public from the road construction. J.A. 201-205.

29. As Senator Abourezk, one of the sponsors of the American Indian Religious Freedom Act, put it: "America does not need to violate the religions of her native peoples. There is room for and great value in the cultural and religious diversity. We would all be poorer if these American Indian religions disappeared from the face of the Earth." American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 2 (1978).

**CONCLUSION**

The decision of the court of appeals should be affirmed.

Respectfully submitted,

MARILYN B. MILES  
STEPHEN V. QUESENBERY

California Indian Legal Services

October 1987

**APPENDIX**

*American Indian Religious Freedom Act*, Pub.L. 95-341, 92 Stat. 469 (1978) (codified in part in 42 U.S.C. § 1996):

“Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

“Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

“Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

“Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

“Whereas the lack of a clear, comprehensive and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

“Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

“Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

“Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

“Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

“Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

*“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indians, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.*

“Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native

traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of this evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.”

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**RESPONDENT'S**

**BRIEF**

(14)  
No. 86-1013

FILED

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CLERK

In The  
**Supreme Court of the United States**  
October Term, 1987

— o —  
RICHARD E. LYG, *et al.*,  
SECRETARY OF AGRICULTURE, *Petitioners*,

v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*,  
*Respondents*.

— o —  
**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

— o —  
**BRIEF FOR RESPONDENT  
STATE OF CALIFORNIA**  
— o —

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## **QUESTIONS PRESENTED**

Whether the construction of a six-mile section of road through an area of land on the Six Rivers National Forest violates the First Amendment rights of Indians to freely exercise their religion when the Indians have shown that the area is central and indispensable to their religious practices and that the proposed actions would seriously interfere with or impair those religious practices and when the government has failed to show an overriding governmental interest.

Whether, under the same facts, there is a violation of the American Indian Religious Freedom Act (42 U.S.C. § 1996) and Forest Service procedures adopted under the Act.



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## **STATEMENT**

The State of California has charged its Native American Heritage Commission with the responsibility to protect the right to practice traditional Indian religion on public land. Protection includes access to sacred sites and prevention of severe and irreparable damage to those sites. (Cal. Pub. Res. Code, §§ 5097.9-5097.99) At the request of Indian believers in the traditional religion of the Yurok, Karok and Tolowa tribes of Northwestern California, and following a hearing on the matter, the Commission initiated one of the two court actions consolidated below.

California concurs in the statement filed herein by Indian Respondents, and therefore limits its statement to highlighting several key issues in the case: (1) the differences between American Indian tribal religions and mainstream religions, (2) the centrality of the practice at issue here to the affected tribal religion, (3) the extreme sensitivity of that practice to any disturbance of the natural setting, (4) the way in which the proposed section of log-hauling road would very seriously impair that practice, and (5) the unmitigatability of the impairment.

Most of the evidence is from the Forest Service's own expert ethnographic reports. The primary report on the role of the high country in the traditional religion of the Yurok, Karok, and Tolowa tribes was done by Dr. Theodoratus and reviewed by Dr. Winters. An earlier report had been prepared by Dr. Buckley. The introductory discussion characterizing the differences between mainstream religions and American Indian tribal religions is taken from the government's "American Indian Religious Freedom Act Task Force Report" prepared at the direction of Congress. (American Indian Religious Freedom Act, Pub. Law 95-341, § 2, hereinafter, frequently, "AIRFA".)

### **1. Differences in Nature of Religion**

There are profound differences between American Indian religions on the one hand, and mainstream religions on the other, as was explained in the AIRFA Task Force Report. (J.A. 227 et seq.)

The mainstream religions are commemorative, that is, they trace their origins back to a specific person or event (e.g., Jesus, the Exodus, Mohammed) which their rituals commemorate. The mainstay of their beliefs is the doctrine that their particular interpretation of reality, usually revealed by the religion's founder, is *the* correct interpretation. Since the religious ceremonies are commemorative, *where* they take place is not nearly as important as the revealed truth which they honor. Major religions have established religious institutions in order to carry on the task of interpreting the "truth" for each generation and in order to protect it from heresies. Mainstream religious institutions have historically sought to impose their interpretation, as the "laws" of God, on others through laws enforced by secular penalties. It is from this commemorative tradition that most current inhabitants of the United States come, many early immigrants having come to escape attempts to force them to accept beliefs or practices which violated their own religious consciences. (J.A. 237-239)

The tribal religions, including the American Indian tribal religions "represent the opposite pole of human experience." (J.A. 239) They are "continuing" religions, not traceable to a founder; their origins are lost in the mists of time. They do not have a set of doctrines or dogma. Rather, they perpetuate a set of rituals and ceremonies which must be conducted both in the same manner and in the same *place*. (*Id.*) A doctrine, which would be a commentary on or interpretation of the rituals, would be inconsistent with the religious role of the rituals themselves. (J.A. 240) "Unlike institutional religion, the tribal religions do not depend upon community participation, but upon the proper performance of the ceremony." (J.A. 243) Exclusion of all but those carrying out the ceremony "is central to many ceremonies." (*Id.*)

Also unlike the major or mainstream religions, which see the world as having been created by the deity at the beginning of time, and as continuing to exist under natural

laws which the deity instituted at the creation, American Indian tribal religions see creation as a continual process. This ongoing process of creation and cosmic growth brings with it the religious obligation for people to participate in that creation through World Renewal ceremonies and respect for nature. (J.A. 240) "The primary essence of the tribal religions is to remain in a constant and consistent relationship with nature. . . ." (J.A. 241-242)

## 2. Centrality of the Affected Practices to the Religion

In the religion of the Yurok, Karok, and Tolowa tribes, the high country is the place given to their people where they can meet and communicate with the great spirit (J.A. 257)<sup>1</sup>—where they can seek religious power. (J.A. 258) As one witness summarized, "It is where we get the power that makes our religious ceremonies significant." (J.A. 262, see also, J.A. 118-137)

A key complex of ceremonies is the World Renewal ceremonies, "whose purpose is the stabilization and preservation of the earth from catastrophe, and of mankind from disease." (J.A. 111) An indispensable participant in the World Renewal ceremonies is the medicine man, who must have been trained in the high country and who must make pre-dance preparatory medicine in the high country before the ceremony. This preparatory medicine is a necessary part of the World Renewal ceremonies. (J.A. 113)

Another key component of the tribal religion is the curing "doctor", a spiritual specialist who has achieved power through a trance and communication with the spirit world. (J.A. 119) The doctors, usually women, go through an extremely arduous training (J.A. 121) whose culmination is experience in the high country. They draw their

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1. One witness translated the concept into the lexicon of a major world religion: "where God had left a piece of land dedicated to . . . the use of the tribes, to go there and pray like they say Mecca . . ." (J.A. 272-273)

powers from the spirits who went to the mountains with the coming of humans to the earth. (J.A. 125) They bring the power down for curing illness in the community. (J.A. 125-126)

The high country is on the steep southern slope of a major watershed, where ascending altitude is associated with ascending power. (J.A. 148) Chimney Rock, near the ridge line, and Peak 8, a couple of miles downslope,<sup>2</sup> are at the pinnacle for achieving religious power. (J.A. 166-168) Doctor Rock, located three to four miles below the ridge is a place where women healing doctors *must* go to receive the highest form of curing powers. (J.A. 161) Since the high country provides a very specialized religious experience at the pinnacle of religious power, it must be understood that its importance to the religious community is not in having large numbers of participants, but in the quality of their experience.

"Only a very few individuals ever make medicine, for instance, on Chimney Rock. However it is important to understand that the entire community has a vested interest in the success of those few individuals, whether they be doctors making medicine at Doctor Rock or Chimney Rock, or men seeking 'high medicine'." (J.A. 133)

### 3. Great Sensitivity of Affected Practice to Outside Disturbance

The practice which is conducted in the high country and which is threatened by the construction of the road has been called "making medicine." Medicine making has been described as an integration of physical, mental, and vocal actions with internally experienced events, "undertaken or sought in a religious manner and frame of mind . . . ." (J.A. 119) Its purpose is to draw religious power through experiencing communication with spiritual powers. It is this core experience of contact with the spirits

2. For general orientation of Chimney Rock, Peak 8, Doctor Rock and proposed road, see map at J.A. 215. See, also, Tr. 89-90

through entry into a trance that is the indispensable culmination of the practice. Thus, while medicine making may incorporate prescribed rituals, prayers, or ordeals, "it is, in the purest sense, an inwardly experienced moment of intense awareness and, in the more lofty (or "High") medicines, of transcendent understanding." (J.A. 119-120)

Because this inner experience is indispensable to the practice, the practice is very sensitive to disturbances. "A man or woman might, then, carry out all of the prescribed actions, and yet not 'make medicine;' that is, not experience the requisite inner state." (J.A. 120)

Success in making medicine is "dependent upon an undisturbed natural setting, silence, and privacy." (J.A. 181) The high religious power that it attached to the high country derives from its cleanliness and purity. (J.A. 150) When an area loses its purity it also loses its power for making medicine. (J.A. 209) Since the entire religious community has a religious investment in those who go to make medicine, any failure in their attempts to make medicine in the high country adversely affects the whole community. (J.A. 133) An unsuccessful attempt to make medicine "is considered a sign of pollution. In such a case the practitioner would be bringing angry spirits home which would result in a tense situation . . . ." (J.A. 136)

Those who seek power in the high country take great pains to maintain their own purity in order to have the purity necessary to go there. For example, a person who is in training for making medicine may not eat with anyone who may be having sexual relations, or menstruating or who may be associating with others doing these impure things, since "training is a period when pollution is particularly contagious." (J.A. 132) "The high country training is a long-term endeavor involving a great deal of preparation, both on the part of the initiate and the trainer." (J.A. 133)

Just before going into the high country to make medicine a person will engage in a 10-day period "of working



vigorously in . . . purification procedures . . . to allow the individual sufficient power to enter the high country" (J.A. 132). The procedures include fasting and praying—traditionally under the instruction of a trainer—confessing mistakes, getting rid of grudges, and getting doctored to get spiritually "cleaned up." (*Id.*) During this period of preparation, the seeker awaits acknowledgment of the spirits that they recognize the sincerity of the quest and that they sanction pursuit of that quest in the high country. The acknowledgment may come in the form of a vision, a dream or other sign.<sup>3</sup>

The entire experience in the high country demands receptivity to nature and avoidance of human intrusion and contamination.

As the seeker walks or runs into the high country, every step of the way is a test and a lesson; "every step of the way you learn something." (J.A. 134)

"[W]hen one is seeking medicine it is very important to avoid people on high country trails." (J.A. 150) If the seeker should encounter passersby, he or she must avoid looking into their eyes in order to maintain purity. (J.A. 134) If he or she should encounter someone who is not pure (who has been drinking water or alcohol, has had sex, or is menstruating), the medicine-making effort may be spoiled. (J.A. 135)

The practice of making medicine entails meditation in an enhanced state of awareness, upon "both the visual and audible constituents of the natural world, often in extremely subtle manifestations." (J.A. 210) As expressed

3. One witness, in describing pilgrimages to the high country in the company of a medicine woman, told how they would stop along the trail at certain places where the medicine woman had to perform her ritual to let the great spirit know that they were on their way to see him for a great reason and they waited at these points for a sign from the great spirit. On one occasion the sign was given when a hawk came and talked to the medicine woman. (Tr. 331-332)

by one Indian consultant<sup>4</sup>: "To make High Medicine you have to be completely aware. Because if you're not, a lot of very important things will just pass you by, and you'll never pick them up." Students in training for making medicine are trained "to achieve absolute concentration and precision" in seeing the natural world, so that through such "open and precise seeing" (J.A. 211), they can contact the spirits in the high country and "receive answers to their prayerful questions from trees, rocks, and more distant clouds and ranges." (*Id.*)

As evidenced in the above discussion, a seeker's enhanced awareness is not just focused down upon the particular "site" of his medicine making as an isolate:

"A particular mountain may be the focal point of medicine but it is only a part, even if a central part, of the site. Standing on a 'site' is not the total experience for those who seek the medicine. The quality of silence, the aesthetic perspective and the physical attributes, are an extension of the sacredness of that particular site. For example, one considers Doctor Rock, which is an important source of medicine in the project area, one must also consider that several locations near or on the mountain are very salient aspects of the sacred site, since all these locations are identified with the mountain." (J.A. 148)

The seeker orients himself towards a long, unbroken view. (J.A. 155, 212) One practitioner expressed: "From Chimney Rock you can see a lot of different high peaks . . . You can see all the way to the ocean . . . Heavy prayers are put on all those places . . . Everything's prayed over, Doctor Rock is right in view of Chimney Rock." (J.A. 165)<sup>5</sup>

4. As used by Dr. Theodoratus, a consultant is an Indian believer whom she interviewed and who provided her relevant information.

5. Another consultant who stressed the need to go to Doctor Rock for spiritual tranquility referred to her ability to see her home near the ocean and expressed her mystical feeling that the site is actually a part of the ocean, "not far from the beginning." (J.A. 161)

The culmination of medicine is entering into a trance (J.A. 135, 211) in which the seeker has contact with the spirit from whom he or she is seeking inspiration. One informant described the experience as follows, using the Yurok word "wa.gay" for spirit. "[O] wa.gay . . . it's something way out there. Yes, we sight away out in the hills where there's nothing around. Just wa.gay, spirit." (J.A. 211) The contact may be experienced as a vision (J.A. 135, 275 ("a light or a phantom")). Consultants "repeatedly stressed" the need of a person in training to be undistracted by the sight of anything other than undisturbed naturalness. (J.A. 178)

Auditory perception, as well as vision, is of great importance to medicine making. (J.A. 211) When, after a period of meditation, a seeker claps his hands in a special way, if the echo he hears is quite clear, this is a sign that the quest has been successful. If, on the other hand, the echo is in any way distorted, the medicine making has been a failure. Hearing also plays a role "of special importance for learning personal medicine songs, which are perceived as though being sung by nature." (J.A. 162, 211) Another auditory aspect of medicine making is the mystic perception of distant sounds such as the sound of waves breaking. In fact, the Yurok word for making medicine means "'You hear a distant sound of singing, something not close to you!'" (J.A. 212) As one believer expressed, "one hopes to hear the distant Spirits who may listen and take pity on the one praying . . . ." (J.A. 155)

Dr. Buckley noted from his research:

"the recurrent theme of *distance*; that is, in the visual and aural aspects of medicine making, distance was a constant factor. Unobstructed lines-of-sight over vast stretches of countryside, distant echoes and reverberations, the intuitive reinforcement offered by far off mountains and clouds . . . ." (J.A. 212-213)

Because of the awareness of things at a distance, it follows that the practices can be completely disrupted by distant, non-natural disturbances. One consultant, for example, said he had been unable to enter a trance at Doctor Rock because blasting had been going on over at the Flint and Elk Valley areas. (J.A. 178)

In sum, to appreciate the sensitivity of the practice to outside disturbances, it is important to understand the "high country as an ecologically and spiritually *interrelated* region, which, in its entirety affects the quality of the vision quest of an individual." (J.A. 190, emphasis in original.)<sup>6</sup> As Dr. Theodoratus summarized, "There is a physical-psychological interaction that takes place between those who go to get medicine and the sacred place which furnishes this medicine. If one feature of this interaction is disturbed, the flow of power is blocked." (J.A. 150-151)

#### 4. The Heavy Burden That Would Be Imposed By the Proposed Road

Perhaps the most "obvious" way in which the proposed road would interrupt this type of private religious training is the destruction of silence in the high country which would occur if a road passes close by the sacred sites. (J.A. 178)

The purpose of the road is to provide a route for hauling timber (Petition at 3), and the Forest Service expects that each day 34 lumber trucks (which are about three times as noisy as an automobile (J.A. 206)), and more than 130 other vehicles (including logging support vehicles and administrative and tourist traffic) would cross the six

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6. Dr. Theodoratus stressed the importance of appreciating "that descriptions which single out specific cultural sites as isolates (e.g., Doctor Rock, Chimney Rock, Peak 8) are distortions of Indian conceptualizations of these important cultural properties." (J.A. 110-111)



miles of road. (Defendants Exhibit G at 34) The road will bisect the area between Chimney Rock, near the top of the ridge, and the Doctor Rock area, some 3 or 4 miles downhill. The Forest Service admits that the sight and sound will have an unavoidable adverse effect on the traditional use of the area. (J.A. 219, 225-226) We discuss here the gravity of that impact.

The Forest Service explains in the EIS that the noise of the logging truck may be "unacceptable" even to the casual recreational user.

"Audiologists recognize a difference between sound and noise. Roughly speaking, 'sound' is a neutral term, while 'noise' is perceived in a negative context. In a dispersed recreation area, therefore, the noise emitted from a nearby chainsaw or logging truck which exceeds the detection level for a significant period of time may be perceived as unacceptable." (J.A. 206)

The Forest Service further explains how the potential of sounds to disturb depends on the activity in which one is engaged:

"The sound of children playing and pots rattling may be perceived as neutral to positive but may become noise if perceived while the recreationist is trying to rest." (*Id.*)

As explained by one of the ethnographers retained by the Forest Service, medicine making is at the very sensitive end of the continuum of activities, and can be profoundly disrupted by the sound of a logging truck:

"What may go unnoticed or be easily accepted and accommodated in one instance may prove distracting, even intolerable, in another. Thus, the degree [to] which the sorts of incursions we are considering here will modify the experience of any given individual or group largely depends on two obvious factors: who is having the experience, and what their purpose is in seeking that experience in a given place. For example, the noise of a truck winding up a hill, reverberating through canyons for miles around, probably will have

no appreciable effect on the experience of a group enjoying a family picnic or other sociable activity in a developed campsite. On the other hand, it will very likely have a profound and detrimental effect on the experience of an individual wishing to silently contemplate the natural world, or on those wishing to practice meditations, devotions, or other spiritual exercises." (Defendants' Exhibit E at 370-371)

This ethnographer noted that "in our thoroughly gregarious, secular, and mechanized era," this is difficult for most of us to appreciate. (*Id.* at 371)

The Indian believers, however, appreciate it perfectly well. One Indian elder stated bluntly that if you are trying to meditate and all of a sudden hear machine noise, "[t]hat isn't so good for meditation . . . ." (J.A. 279; see, also, 280) The sound of noise further disrupts meditation in that it is psychologically disturbing because it is seen as a lack of respect to disturb the peacefulness of the high country. (J.A. 178)

The visual impact of the road and the traffic on it would also make it impossible to engage in the kind of meditation that is medicine making. Consultants "repeatedly stressed" the need for those undergoing medicine training not to be distracted by non-natural visual intrusion such as scarred hills and disturbed rocks. (J.A. 178) Since those making medicine at Doctor Rock orient themselves up toward Chimney Rock (J.A. 165), and those making medicine at Chimney Rock orient themselves down the slope toward Doctor Rock (Tr. 89-90), it can be seen that the sight of the road and traffic on it running along the slope between these two altars of high medicine will destroy the ability to make medicine.

As summarized by one of the Forest Service experts:

"It should be clear that any major roads . . . within sight or hearing of the High Country district will, to a significantly great extent, jeopardize the visual and aural factors contributing to the overall cultural value of the area, decreasing to an extreme degree the op-



portunities for silent contemplation of primeval nature which traditionally has formed a cornerstone of medicine making there." (Defendants' Exhibit E at 370, see, also J.A. 193; emphasis added.)

Also, "the increased access afforded and encouraged by a high-standard paved road . . . will directly contribute to the destruction of . . . the solitude and privacy" which are a significant part of the area's sacrosanct quality and which will frustrate attempts to make medicine. Such interference has already occurred. (J.A. 164, 193)

This intrusion poses a real threat to the community's ability to maintain the religion.

"These areas need to be there when a new Indian person gets the "calling" to become a medicine person. Suppose the "calling" is received and the person arrives to find an army of tourists to take pictures and make tape recordings of a real live medicine person in the process of training. . . . The solitude and atmosphere for meditation is totally lost. How will that person train properly? . . . The culture has been torn apart by progress and now people are asking for the pieces to be torn in smaller pieces." (J.A. 151)

Along with the loss of solitude and privacy, increased use by people coming in vehicles will increase the spiritual pollution of the area—the possibility of having the whole medicine-making endeavor ruined by encountering someone who is impure (has been drinking or having sex).

Thus, the road would thwart efforts to make medicine in the high country both by direct physical interference and by psychological interference. We stress again the vulnerability of the practice to environmental disturbances:

"There is a physical-psychological interaction that takes place between those who go to get medicine and the sacred place which furnishes this medicine. If one feature of this interaction is disturbed, the flow of power is blocked." (J.A. 150-151)

As we have seen, the preparations for making medicine in the high country are long and arduous. If a person training to become a doctor has a bad experience in the high country, the injury cannot quickly or easily be repaired, and the well-being of the entire religious community is threatened. One practitioner expressed:

"'Doctoring has got to get picked back up again. If that G-O Road goes through, like they want to push it through, I think it's going to have a great effect on our doctoring. I think it's going to spoil it. At this time we're not thinking about doctoring until that road is stopped.'" (J.A. 179)

The Theodoratus study concluded that existing intrusions into the high country have already impaired the success of quests for spiritual power and that the road would further adversely affect the ability to draw spiritual power from the area. (J.A. 193) It went on to make conclusions about the gravity of the threat posed by the burden on the practice to the viability of the religion.

"The research has shown that the spiritual, moral and physical viability of the practitioner's home community will be diminished in proportion to the diminished ability to seek and attain power within the high country. Research also has demonstrated that the Indian concept of World Renewal is inextricably related to religious practice in the high country. Intrusions on the sanctity of the Blue Creek high country are therefore *potentially destructive of the very core of Northwest religious beliefs and practices.*" (J.A. 193; emphasis added.)

##### **5. Non-Mitigatability of a Route Through or Near the High Country**

Doctor Theodoratus concluded as follows:

"The nature of Northwest Indian perceptions of the high country and the requirements of their specific religious beliefs and practices associated with the high country make mitigation of the impact of

construction of any of the proposed routes [through the high country] impossible." (J.A. 195)

Accordingly, Dr. Theodoratus recommended that "the G O Road be connected by a route significantly distant from any portion of the sacred Blue Creek high country." (J.A. 194)

Dr. Winters, the Forest Service in-house anthropologist who supervised the Theodoratus contract, testified that the only way the effect of the road could be mitigated would be to move its location *15 to 20 miles away*. Moving the road a mile down the hill from Chimney Rock (and closer to Doctor Rock), as the Forest Service proposes, does *not constitute mitigation* of the effects on religious practices. (J.A. 271)

Dr. Theodoratus' and Dr. Winters' conclusions had been anticipated by Dr. Buckley, an earlier Forest Service consultant, who also had concluded that since:

"Many of [the essential] factors are of an extremely subtle nature, . . . more easily grasped through psychological than physical concepts; solitude, privacy, visual and aural perception of untrammelled nature and, above all, an ineffable quality of spiritual force or presence. . . ." (Defendants' Exhibit E at 370)

and since "the impact of additional development will be significant at extremely subtle levels", the impact of the road "*cannot in fact be mitigated*." (*Id.* at 373; emphasis in original.)

## SUMMARY OF ARGUMENT

### 1. Burden on Religious Practices

The government action of building the G-O Road through the sacred "high country" area will severely impair the ability of the Yurok, Karok and Tolowa Indians to make medicine there in order to draw the religious power necessary to their religion. Thus, the facts are quite unlike those in *Bowen v. Roy*, 476 U.S. —, 106 S.Ct. 2147 (1986), where this Court found no infringement of the Free Exer-

cise Clause because the government action at a remote location did not place any restriction on what the believer could do. The severe impairment of the central practice of making medicine in the high country threatens the religion at its very core. It presents the kind of objective threat to religious practice which this court found necessary to protect in *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

The Forest Service claims that there is no "coercion" so as to trigger the First Amendment because the government is not enforcing any law by the imposition of a penalty. The government action does, however, involve true coercion, since the Indians have no choice to continue that practice when the *sine qua non* for that practice is destroyed. Contrary to the Forest Service contention, the First Amendment does not countenance coercion just because it is not enforced by a worldly penalty. Moreover, the basis upon which Indians lost title to all their lands, including their sacred lands is a doctrine which "penalized" the Indians on the basis of their religious beliefs. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

The Forest Service claims that to leave the high country undeveloped for protection of the Indians' religious practices would be to provide the Indians an unnecessary subsidy. Forebearing to destroy the salient qualities of the high country does not provide the Indians with something they did not have before. By contrast, the government by statute offers to mainstream religion land in the National Forest Service for establishing churches and offers many other affirmative acts of support, as discussed in *Lynch v. Donnelly*, 465 U.S. 668 (1984). To provide affirmative support to mainstream religions and at the same time to destroy the heart of the traditional religion for the Yurok, Karok, and Tolowa would be for the government to show the preference for one religion over another that the Establishment Clause forbids. *Larson v. Valente*, 456 U.S. 228 (1982).

Finally, the desecration of the traditional tribal religion's holiest place and the disruption of the practices indis-



pensible to the nourishment of the religion shows "hostility, not neutrality" toward the religion. *Bowen v. Roy*, 106 S.Ct. 2147, 2156.

## 2. Government Interests

The Forest Service in effect concedes that the purposes served by this particular road project do not override the Indians' religious rights. Rather than focus on those particular purposes, it seeks refuge in a vaunted conception of managerial prerogative. Because federal land is a finite resource, goes the argument, and because land uses which conflict with religious uses may serve the interests of other members of the public, there is a compelling state interest in deferring to the Forest Service judgment in 'balancing the public interests', as long as it makes a showing of "reasonableness." (Petitioner's Brief at 41)

The generalized nature of the interest urged here makes it of the kind which this Court has never found to justify abridging religious rights. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). All government resources are finite, and there is no more justification for extraordinary deference to agency discretion in this context than in others, such as distributing unemployment benefits. Cf. *Hobbie v. Unemployment Appeals Comm'n.*, — U.S. —, 107 S.Ct. 1046 (1987).

Nevertheless, out of concern for government's interests in managing its lands, Courts of Appeals have already fashioned a test which gives government land management decisions greater than ordinary deference by elevating the threshold for what will be recognized as a burden in the first place. That threshold is that the particular land must be indispensable to a practice. See, *Wilson v. Block*, 708 F.2d 735, 743-745 (D.C. Cir. 1983).

The test for government interest urged here has considerably less justification than that proposed by the Chief Justice in *Bowen v. Roy*, 106 S.Ct. 2146, 2149, and rejected by this Court. (See, *Hobbie v. Unemployment Appeals*

*Comm'n.*, *supra*, 107 S.Ct. at 1049.) The government interest which concerned the Chief Justice was to avoid case-by-case review of exceptions to rules applying to millions of people. Here, land use decisions are made on a case-by-case basis anyway, and the American Indian Religious Freedom Act requires the Forest Service to obtain evidence on how land use may impair Indian religious uses. What the Forest Service seeks, then, is the right to adjudicate the Indians' religious rights on an *ad hoc* basis, not only contrary to First Amendment guarantees, but also contrary to basic notions of fairness, and contrary to the government's special obligation to deal fairly with Indians. *Morton v. Ruiz*, 415 U.S. 199 (1973).

Finally, the public forum doctrine from free speech law will not serve to avoid the necessity for the government to show a compelling state interest to justify destroying the only place where these practices can be conducted.

## 3. American Indian Religious Freedom Act

AIRFA (42 U.S.C. § 1996) was born of Congressional concern that in the past, government activity, including land management, had violated Indians' constitutional rights to practice their religion. The Act provides assurance, *inter alia*, of "access" to sacred sites. It must be assumed that Congress did not intend a cruel joke by assuring access to a sacred site which had been destroyed, and the legislative history bears the assumption out. So does the administrative interpretation. The report, which AIRFA required the Executive Branch to prepare in order to advise Congress on problems and actions which should be taken, states categorically that the preservation of the natural qualities of the sacred areas is the *sine qua non* of that access. The road will destroy those qualities. Finally, the Forest Service adopted procedures, in order to comply with AIRFA and reported to Congress in the AIRFA Task Force Report, that mandated preservation of lands when consultation with Indians found that it was so required for religious pur-



poses. Accordingly, the relief granted below is no more than required by AIRFA, by the administrative interpretation of AIRFA, and by Forest Service procedures adopted under AIRFA.

### ARGUMENT

#### A. PUTTING THE G-O ROAD THROUGH THE HIGH COUNTRY WILL BURDEN THE INDIAN'S FREE EXERCISE RIGHTS

##### 1. Unlike the Facts in *Bowen v. Roy*, the Forest Service Action of Building the G-O Road through the High County will Directly and Severely Impair An Essential Religious Practice

The Forest Service contends that the facts in this case are not legally distinguishable from those in *Bowen v. Roy*, 106 S.Ct. 2147 and that, accordingly, this Court should rule as it did there that no cause of action has been stated under the Free Exercise Clause. The distinction, of course, is between government actions which take place at a location isolated from where religious practices are conducted and government actions which intrude destructively on the only location where the practices can be carried out.

Mr. Roy had objected to the government's using, within the confines of its offices and at whatever distant location, a Social Security number to identify his daughter in its record keeping. As this Court capsulized:

"Roy objects not *because it places any restriction on what he may believe or what he may do*, but because he believes the use of the number may harm his daughter's spirit." (*Id.* at 2152; emphasis added.)

Here, on the other hand, the government action is not at some physically removed location where it places no restriction on what a practitioner may do. On the contrary, it reaches out to the sole location where practices critical

to maintenance of the religion can be conducted, and it physically destroys the environmental conditions and the privacy without which the practices cannot be conducted. In short, it severely restricts what the Yurok, Karok, and Tolowa can do to maintain their religion.

The impact of the government action in *Bowen v. Roy* could be characterized as interfering with Roy's religious tenets from a subjective point of view, where the government's conduct of "its own internal affairs" (*Id.* at 2152) was known to him only secondhand and did not interfere with his ability to practice his religion.<sup>7</sup> Here, the interference with practice is even more direct than that presented to this court in *Wisconsin v. Yoder*, 406 U.S. 205.

In *Yoder* there was evidence that exposing Amish children to "worldly values" through secondary education "could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today." (*Id.* at 212.) This Court found that the psychological impact on children that would *eventually* affect their religious practice was more than merely subjective:

"Nor is the impact of the [government action] confined to grave interference with important religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was de-

7. Although the Forest Service intimates in a footnote (Petitioners' Brief at 28, fn. 24) that perhaps the way it manages its own property is its "own internal affair", it never seriously suggests that the G-O Road affects only internal governmental operations and does not affect Indians and others using the area. On the contrary, it bases its claim of a compelling state interest on an assertion that any government land management decision greatly affects the public interest and is fraught with conflict as between differing public interests.

signed to prevent. As the record shows [the government action] carries with it a very real threat of undermining the . . . community and religious practices as they exist today; they must either abandon belief . . . or be forced to migrate to some other and more tolerant region." (*Id.* at 218)

Here, the government action directly and immediately interferes with the practice of religion. Moreover, unlike the Amish, the Indians do not even have the choice of migrating to another region, since the practices in the high country are indispensable to their religion.<sup>8</sup>

**2. The Destruction of The Salient Qualities of The High Country Will Coerce The Indians To Go Without The Practice of Making Medicine**

As we have seen, the practice of making high medicine, of training to be a doctor, and of preparing the medicine man for the essential World Renewal ceremonies, must be conducted in the high country, a locale which is much more than merely an intersection of latitude and longitude, but a constellation of salient attributes, many of which are of an extremely subtle nature. The practice requires an interaction of the utmost sensitivity between the medicine seeker and the homogeneous, untrammelled environment, and if even "one feature of this interaction is disturbed, the flow of power is blocked" (J.A. 151)—in sum, the practice is forcibly prevented.

Although the Forest Service has judicially admitted that "the purity and integrity of the high country are the *sine qua non* of the ability to draw power for the well-being of the questor and the community" (J.A. 50 (Para. 8), 84 (para. 8)), yet it maintains that the destruction of the qualities of the high country which are indispensable to

8. When the federal government required Indian people from the Klamath River to move to distant reservations, they almost invariably escaped and made their way back to their homeland and their traditional religious practices. (J.A. 185)

the practice does not force or coerce cessation of the practice. Logic dictates otherwise.

Clearly, the government can tend to coerce the non-observance of a religious practice by threatening either a sanction (*Wisconsin v. Yoder*, 706 U.S. 205) or the withholding of a government benefit (*Sherbert v. Verner*, 374 U.S. 398). However, it can coerce cessation of the practice much more surely by manipulating physical conditions so as to render the practice impossible. Recent examples of the latter form of coercion are described in the cases of *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980) cert. den., 449 U.S. 453 (1980) and *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) cert. den. 452 U.S. 954 (1981), where government action flooded sacred sites with water impounded behind large dams, so that Indians could no longer go there to conduct traditional religious ceremonies associated with the sites. They were forced to abandon the practices. The government's AIRFA Task Force Report decries another and earlier example where federal officials in collaboration with missionaries instigated the deliberate destruction of a sacred quarry which held great religious significance for tribes within nearly a thousand mile radius. The pretext was a transportation project, the construction of a railroad link. During construction, the sacred ledges were blasted in order to render them useless for ceremonial purposes. (J.A. 236) Logic does not admit of the conclusion that the flooding in *Sequoyah* and *Badoni* and the blasting of the railroad through the sacred quarry ledges did not very directly coerce the Indians into abandoning the practices associated with those areas; they were left with no choice. Similarly, logic rejects any sophistic argument that "flooding" the high country with the sights, sounds, and human intrusion that make their practices impossible does not forcibly deny the Yurok, Karok, and Tolowa of the choice to continue those practices.

In trying to bolster its argument that the action here does not involve the coercion necessary to implicate the



Free Exercise Clause, the Forest Service argues that the action is not "directed at" the Indian believers at all. In effect, however, this action is directed at these believers and this religion much more specifically than, for example, the law in *Thomas v. Review Bd.*, 450 U.S. 707 (1981), which affected any person who left employment because his or her practices were interfered with by the conditions of employment or in *Larson v. Valente*, 456 U.S. 228, which affected all smaller, less established sects. Here, the effect of the government action is levelled solely at the tribal religions of the Yurok, Karok, and Tolowa.

Moreover, unlike the situation where the government passes laws of broad general application without knowing whose, if anyone's, religious practices will be impaired, here the Forest Service had a full evidentiary record showing the destructive effect the road would have. Because of Congressional concern for past violation of Indians First Amendment Rights by insensitive federal land management, the Forest Service was required by the American Indian Religious Freedom Act, (42 U.S.C. § 1996) to collect extensive evidence regarding the effect of the road on the affected tribal religions. In effect, the Forest Service decision was in the nature of a quasi-adjudicatory decision of these Indian believers' rights, based upon evidence on the record. As the Forest Service expressly found, the "abundant data", supplied by six experts, supports the religious importance of retaining the high country as an "[u]ndisturbed, unaltered, and pristine area[]" (J.A. 224); and "[a]ll of the cultural resources investigations document that building the road on any of the proposed routes would create an adverse effect" on the religious use. (J.A. 225)

Thus, though we do not in any way suppose that the Forest Service decided to build the road for the purpose of destroying the Indian religious practices in the high country, since the Forest Service knows what the effect

will be, it is knowingly, if not with hostile intent, causing the severe impairment.

### 3. The Free Exercise Clause Protects Against Government-Imposed Burdens on Religious Practice, Regardless of the Means by Which Government Action Imposes Such Burden

The Forest Service argues that the Free Exercise Clause only recognizes the form of coercion that is applied through imposition of a penalty, either in connection with direct regulation, or by indirect regulation, denying an otherwise available economic benefit. (Petitioners' Brief at 22-23) In short, the government maintains if the burden is not in the form of some sort of a penalty affecting the practitioner's worldly, non-religious interests, as opposed to action more directly affecting his religious interests, the Free Exercise Clause will provide him no assistance.

Of course, it is only necessary to use the threat of penalty to prevent a religious practice where you cannot more directly control or destroy access to the "sine qua non" of religious practice. For the most part, the means for carrying out the practices of the major religions are widely and readily available in the private sector. However, in those rather unusual circumstances where government has absolute control over access to things that are necessary to the conduct of a practice, the Free Exercise Clause does not close its eyes to denial of such access.

One situation where government has absolute control of a believer's access to religious objects is in prison. In that setting, the Free Exercise Clause requires scrutiny of denial of access to a Bible (*Davis v. Schmidt*, 57 F.R.D. 37 (7th Cir. 1983)), scrutiny of a disparity between access to the Bible and access to the Koran (*Pitts v. Knowles*, 339 F.Supp. 1183 (W.D. Wis. 1972), aff'd 478 F.2d 1405 (1973), scrutiny of denial of access to religious services (*O'Lone v. Estate of Shabazz*, — U.S. —, 107 S.Ct. 2400 (1987)) and scrutiny of disparate access to Christian and Buddhist services (*Cruz v. Beto*, 405 U.S. 314 (1971)). The need for scrutiny is not obviated by the fact that denial of access is



not enforced by attaching some sort of a penalty to the prisoner's secular interests. Where religious practices can be stopped very directly, it does not matter that they are not also discouraged indirectly by threat of worldly punishment.

Once the legal principle is established that the First Amendment is offended whether it is the purpose "or effect" of the government action to impede the religious practice (*Braunfeld v. Brown*, 366 U.S. 599, 607 (1960)), then the particular means whereby that effect is brought about becomes legally irrelevant.

Since our Constitution "affirmatively mandates accommodation, not merely tolerance, of *all* religions . . . ." (*Lynch v. Donnelly*, 465 U.S. 668, 673: emphasis added), it follows that each religion must be accommodated according to its particular needs, and not simply to the extent and in the manner that other religions have been found to require protection.

Here we have established that the pristine condition of the high country is the necessary condition, the sine qua non, for the practice of entry into a trance for mystic communication with the great spirit. Without it, the religious practice simply cannot be conducted. It is this core practice of worship which the California Supreme Court protected in *People v. Woody*, 61 Cal.2d 716 (1964) by invoking the Free Exercise Clause to protect the use of peyote in a ceremony whose "central event" was the use of the peyote in quantities sufficient to induce a hallucinatory state for the purpose of "enabl[ing] the participant to experience the Deity." *Id.* at 721. To be sure, in that case the use of peyote was directly prohibited by law, and the prohibition was enforced by penal sanction. But, had the government instead planned to destroy all the peyote cactus, it would not have been less of a burden.<sup>9</sup>

9. Indeed, it is ironic to argue that where a practice is considered by society to be so threatening as to require the imposition of criminal sanctions, the Constitution will protect it, but where it is non-threatening, even laudatory behavior, such as communing with nature, the Constitution leaves it to the mercies of managerial prerogative.

It is, moreover, appropriate to inquire in this context the basis upon which the government claimed, historically, the right to assert title to this land inhabited by the Indians. The basis for the taking was, in fact, a "penalty" imposed on the Indians because of their religion—because they are not Christian.

As described in this court's opinion in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), the white settlers applied a doctrine called "the right of discovery" to countries "then unknown to Christian people." The doctrine asserted "a right to take possession, notwithstanding the occupancy of the natives, who were heathens, at the same time, admitting the prior title of any Christian people who may have made a previous discovery." (*Id.* at 576-577).

As Justice Marshall explained:

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity . . . ." (*Id.* at 572-573.)<sup>10</sup>

While expressing some moral reservations, Justice Marshall nevertheless ultimately concluded as follows:

10. The Indians apparently did not agree with the potentates of Europe that the opportunity to abandon their own religion for Christianity constituted a fair bargain for the loss of their land, and "[t]he Europeans were under the necessity either of abandoning the country and relinquishing their pompous claims to it or of enforcing those claims . . . ."

"Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title . . . ." (*Id.* at 589.)

and

"However extravagant the pretension . . . , [h]owever this . . . may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, . . . it . . . certainly cannot be rejected by Courts of justice. (*Id.* at 591-592.)

Thus, the Indians suffered at the hands of the government what may be the ultimate "penalty" for their beliefs, i.e., the loss of all of their land, including their sacred areas. The government now seeks to use this penalized status as justification for imposing the further injury of desecrating their religious areas. It may be too late now for the courts to rectify the original injustice—as indeed, Justice Marshall felt it was too late in 1823, 30 years after the First Amendment was added to our Constitution; but it is not too late to acknowledge, at the very least, that when the United States assumed title to the Indian sacred areas it took them subject to the First Amendment imperative that they not be managed in such a way as to make impossible the religious practices dependent upon them.

**4. Forebearing to Destroy The Salient Qualities of The High Country Does Not Provide An Unnecessary Government Subsidy to The Indian Religion. By Contrast, There Are Many Examples of Government Assistance of Mainstream Religion, Invoking Establishment Clause Scrutiny of Disparity in Extent of Government Accomodation**

The Forest Service claims that for it to forebear destroying the qualities of the high country necessary for making medicine would be tantamount to a government subsidy to the Indian's religiously motivated practices. Based upon such premise, it argues that, whereas the government may not prohibit a constitutionally protected ac-

tion, neither is it required to subsidize it. In support of this argument it quotes, rather astonishingly, from this Court's opinion in *Harris v. McRae*, 448 U.S. 297, 316 (1980), in which the Court found that the government need not fund an abortion for a woman desiring to have one. The Court explained, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." (*Id.* at 316) If there is anything that is clear in this case, however, it is that the obstacle to the Indian's medicine making which the G-O Road will impose is of the government's own creation.<sup>11</sup>

As we have discussed above, the government is not providing the Indians with something they did not have before when it restrains itself from destroying the high country.

By contrast, the government *does* maintain an open offer to mainstream religions to subsidize their religious practices by giving over portions of the national forest for their exclusive use for the purpose of establishing new churches. Title 16 U.S.C. § 479 provides in pertinent part:

"The settlers residing within the exterior boundaries of national forests, or in the vicinity thereof, may maintain . . . churches within such national forests, and for that purpose may occupy any part of the said national forests, not exceeding . . . one acre for a church."

More offensively, the government maintains an open offer of *Indian* lands in order to subsidize missionary efforts to convert Indians into mainstream religions. The Secretary of Interior is authorized by statute to patent to missionary

11. It will, of course, not serve to say that the government is only laying a strip of asphalt and someone else is driving the logging trucks, since the very purpose of the road is to enable the passage of the trucks. (Petition at 3) (See *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980), where the court found that in permitting religious proselytizers into the jail, the state violated inmate's religious freedom if it allowed their witnessing to take place "in such a manner as to make it nearly impossible for the inmates to 'escape' the preaching.")



boards lands on Indian reservations so long as they are used for missionary purposes, and only upon discontinuance thereof to "revert to Indian owners." (25 U.S.C. § 280)

It is also noteworthy that our government was quick to intercede when it appeared that some of the sacred sites of the Christian, Jewish, and Moslem religions in Jerusalem might be imperilled or access to them be denied. Following the Six-Day War, the United States representative to the United Nations declared that "the safeguarding of the Holy Places, and freedom of access to them for all, should be internationally guaranteed" (U.N. Doc A/P.V 1546, quoted in Jones, *The Status of Jerusalem: Some National and International Aspects*, 33 *Law & Contemp. Probs* 169, 172 (1968), Gordon, *Indian Religious Freedom and Government Development of Public Lands*, 94 *Yale L.J.* 1447, 1465, n. 83 (1985)). Our government has also stressed in its dealings directly with Israel the importance of protecting the "special interest of three great religions in the holy places of Jerusalem" (Jones, at 172; Gordon, at 1451, n. 16.)

"The clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another." (*Larson v. Valente*, 456 U.S. 228, 244)<sup>12</sup> Moreover, the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." (*Id.* at 245)

It is not only in offering land for churches and missions and in lending its support for preservation of holy sites that the government assists mainstream religions. In *Lynch v. Donnelly*, 465 U.S. 668, 674-682, this court described some of the support which mainstream religions receive from the government, including the provision of chapels in the Capitol, provision of Chaplains,

12. See, also, *Gillette v. United States*, 401 U.S. 437, 449 (1971). "An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause . . ."

busing students to church-sponsored schools, excusing students from public schools for religious training, giving textbooks to church-sponsored schools, giving unrestricted grants to church-sponsored universities, and granting tax exemptions for church properties.

Notable among benefits provided to mainstream religion is the proclamation of "both Christmas and Thanksgiving National Holidays in religious terms" (*Id.* at 676), with our President exhorting the nation to spend the month between these holidays "reading . . . the Holy Scripture." (*Id.*, n.3)<sup>13</sup> Although this Court referred to these holidays as part of "our religious heritage" (*Id.*, emphasis added), we must remember that to Indian believers, these may be reminders of the vanquishing of their own religious heritage. Indeed, it is not surprising that Thanksgiving, which celebrates the successful establishment of white settlement in this land, is regarded by some Indians as a day of mourning. (Richard Pemberton, Jr., "I Saw That It was Holy"; *The Black Hills and the Concept of Sacred Land*, 3 *Law and Inequality* 287, 336, n.207)

In conclusion, to provide all the affirmative support that it does to mainstream religions, while at the same time to deliberately destroy the only place on earth where the Yurok, Karok, and Tolowa religion can be nurtured, would be to discriminate invidiously against the Indians' religion in violation of the Establishment Clause.

##### **5. To Build The Road and Destroy The Salient Characteristics of The High Country Would Display Hostility Toward The Tribal Religion**

Government actions which "tend to exhibit hostility" (*Bowen v. Roy*, 106 S.Ct. 2147, 2156; *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046, 1050, n. 7), or even those which display "callous indifference" (*Lynch v. Don-*

13. As we have seen, the notion of a scripture purporting to interpret religious experience is antithetical to Indian religion.



nelly, 104 S.Ct. 1355, 1359; *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)), toward any religion are forbidden by the First Amendment.

In its AIRFA Task Force Report the Executive Branch summarized some of the past government actions taken with the hostile intent to suppress Indian religious dance ceremonies and other practices and even to deny their status as religious practices. (J.A. 227-237) As recently as 1921, the Indian Commissioner published a directive which opens as follows:

"The sun-dance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided." (J.A. 235, emphasis added.)

Today we are confronting governmental action which, although not intended to suppress the religion, in fact threatens to destroy the practices and the shrine which are at the very heart of the Northwest California Indian religion. After reviewing Dr. Theodoratus' report, the Forest Service's Dr. Winters integrated the meaning of this project into its historical context. He characterized the conflict between the Forest Service desire to build the road and the Indians' religious practice as "a continuation of the century old confrontation between Indian and non-Indian cultures in northwest California." (J.A. 199) He concluded that in some ways this particular confrontation poses a more serious threat to the community's survival than the earlier warfare, "since it threatens the core of their religious system." (J.A. 200) As he explained, because the high country is sacred ground inhabited by religious spirits, the Indians hold that it "cannot be owned, sold, exploited or otherwise treated as a 'commodity.' It is the heart of their religion." (*Id.*) The white culture, on the other hand, views the area as merely an economic resource. (*Id.*) The Forest Service intends forcibly to impose the white culture's value system by turning the high country into a road for logging trucks and other vehicles.

What is the message inherent in this imposition? As Dr. Winters expressed,

"By denying that it is a fragile, significant area with religious values, the non-Indian is actually stating that the Indians' religion is of no value." (*Id.*)<sup>14</sup>

This is the kind of religious injury against which Congress intended to legislate when it passed the American Indian Religious Freedom Act (42 U.S.C. § 1996), to wit:

"the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the status as 'real' religion. Yet, the effect on the individual whose religious customs are violated or infringed upon is as onerous as if [they] had been Protestant, Catholic, or Jewish." (H.R. No. 95-1308, published in 1978 U.S. Code Cong. & Ad. News, at 1262, 1265.)

This act of hostility is even further exacerbated by all the past losses of ceremonial sites to white man's "development." After recounting how Indians had lost their lands and had ceremonial sites destroyed, one Indian elder concluded, "In that way we lost everything and now we are standing on the last peak, Doctor Rock, Chimney Rock." (J.A. 274). She, very generously, absolved the "new people" (white people) of cruelty or unkindness for past desecration of ceremonial sites, saying "[t]hey were not cruel . . . [o]r unkind. They just did not understand." (*Id.*) The same excuse will not serve this time. The government understands perfectly well what it is doing, it is saying that it is willing to destroy the Indians' most sacred shrine, to destroy their ability to conduct the core practices which must be carried out there and upon which other core practices are dependent, indeed, to threaten the very destruction of their religion; all of this, merely to gain a minimum economic advantage. This is, at best, callous indifference, and tends to exhibit hostility in violation of the First Amendment.

14. Dr. Buckley, another ethnographer under contract to the Forest Service, warned that government actions intruding on the high country would "imply a willingness to coopt . . . an ancient and central religious" symbol and site. (Defendants' Exhibit E at 371)

**B. THE TEST WHICH THE FOREST SERVICE PROPOSES FOR A GOVERNMENT INTEREST IN LAND MANAGEMENT DECISIONS SUFFICIENT TO JUSTIFY BURDENING FREE EXERCISE IS TOTALLY UNJUSTIFIED**

No claim is made for the proposed road that the specific interests it serves are compelling, or even that they could not be served by other means that would not impede the tribal religious practices in the high country. Rather, the Solicitor General urges on behalf of the Forest Service a new test of overriding governmental interest. (Petitioner's Brief at 37-41) This proposed new test is based upon a very generalized statement of government interest, namely, that if the government leaves land undeveloped in order to avoid interfering with religious use, the land cannot be put to some other conflicting use which may serve other public interests. This Court has, of course, long held that generalized claims of governmental interest are not sufficient to override the constitutional guarantee of religious freedom. (*Sherbert v. Verner*, 374 U.S. 398, 407) Moreover, as Solicitor General Fried himself stressed some years ago, fairness and intellectual honesty require that in conducting a balancing test on constitutional rights the interests on either side must be stated at the same level of generality:

"One thing is perfectly clear, that under no circumstances should the Court formulate the conflict in a particular case, or identify the elements of the balance to be struck, in such a way that the statement itself prejudices the decision. It would, indeed, be begging the question to purport to balance some highly generalized and obviously crucial interest, such as the right of the legislature to inform itself on matters bearing on national security, against some rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee

on this occasion. Any such formulation, of course, seems to require only one answer, but it does so at the expense of ignoring the fact that the claim of the witness may be stated in equally generalized form, and therefore may take on equally impressive proportions. The Court should never cast the controversy in a form which conceals the conflict to be resolved, as it does whenever it inflates one part of the balance while leaving the other highly particular." Fried, "Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test", 76 Harv. L. Rev. 755, 763 (Footnote omitted) quoted in Pepper, "Taking the Free Exercise Clause Seriously", 1986 Brigham Young U. Law Rev. 299, 312-313, n. 60)

In the case at bar, the government is urging a very generalized interest, essentially managerial prerogative dressed up as "balancing public interests", while at the same time urging a severe narrowing of the Indian believers' interests (i.e., freedom from secular penalty). This is a classic example of the approach to balancing constitutional rights which Mr. Fried has correctly and persuasively argued is impermissible.

We will further discuss the following below: 1) Land management decisions do not differ from other government policy decisions in that the true governmental importance can only be evaluated at the particularized level and there is no constitutional justification for the court to cede the area to managerial discretion. 2) Nevertheless, the balancing test fashioned by Courts of Appeals and applied in this case already grants the land manager unusual protection from judicial scrutiny. 3) The greater deference which the Forest Service seeks here is even less justifiable than the proposal this Court recently rejected in *Bowen v. Roy*, 106 S.Ct. 2147, and *Hobbie v. Unemployment Appeals Com'n*, 107 S.Ct. 1046. 4) The public forum doctrine cannot be used to avoid the need for showing a compelling state interest.



**1. Land Management Decisions Do Not Involve Interests Calling for a Greater Level of Judicial Deference than Other Governmental Policy Decisions**

The general interests asserted here for federal land management decisions well illustrate why a generalized claim of compelling state interest is deemed insufficient, for it falls apart under the particularized "searching examination" (*Wisconsin v. Yoder*, 374 U.S. at 407) required by the Free Exercise Clause.

Although federal land ownership is finite, as the Forest Service asserts (and as are all government resources), it is certainly not scarce. Moreover, it can be extended anytime the government chooses to exercise the power of eminent domain. The federal government owns in total 726,686 million acres of land, with 48,009 million acres in California alone, comprising approximately 48 percent of the total land area of the state. (U.S. Govt. *Statistical Abstract of the United States*, 1985 (pub. 1987) page 183, Table 320) Indeed, five years ago the administration initiated a program to declare 35 million acres of federal land surplus for purposes of sale.<sup>15</sup> The Six Rivers National Forest itself comprises over 855,000 acres.

Generally, then, there is no reason to assume as a matter of fact that uses which would conflict with the religious uses of public land could not be accommodated on other portions of public land. That is what the court found in the case of *United States v. Means*, 627 F.Supp. 247, 251-52 (D.S.D. 1985), where it required the Forest Service to grant for Indian religious purposes a special use permit on 800 acres of National Forest. Although it was estimated that the area had been used for approximately 6000 recreational visits per year, for uses including picnicking, fishing, hunt-

15. See, *Time*, August 23, 1982, cover article: "Land Sale of the Century" at page 16. ("Both President Reagan and his Interior Secretary James Watt are convinced that the U.S. owns far more land than it needs or can manage.")

ing, target practicing and off-road and on road vehicle travel, the court found the recreational uses could be carried out equally well on other portions of the National Forest. The 800-acre tract represented only .00052% of the total land in just the one National Forest. (*Id.* at 255) Accordingly, the Court concluded that the Forest Service "objective in its overall management of the Black Hills National Forest" would not be "materially impaired" by giving the Indians exclusive use of the 800 acres. (*Id.* at 264)

Here, in carrying out its obligations under the National Environmental Policy Act, the Forest Service looked at two alternative routes outside the high country for completing the G-O Road. (J.A. 217-218) Each of the routes would have been longer and costlier and would have required purchase of some existing private road.<sup>16</sup> Nevertheless, their feasibility is illustrative of the fact that even particular public purposes rarely demand a particular piece of land.

Even where all public interests cannot be fully accommodated, there is no reason to give government land management decisions more deference than other government actions on the basis that they may involve competing claims to public resources. Indeed, government policy decisions typically do involve resolution of competing claims. For example, to provide unemployment benefits to those employees who quit their jobs for religious reasons (*Hobbie v. Unemployment Appeals Comm'n.*, 107 S.Ct. 1046, *Thomas v. Review Board*, 450 U.S. 707, *Sherbert v. Verner*, 374 U.S. 398), is to make less money available for other unemployed.

Finally, there is no reason to believe that Forest Service balancing of religious interests as against other com-

16. Each route also had some stability problems, yet the route planned through the high country has such serious stability problems that the court ruled that erosion from anticipatable landslides would violate the Federal Clean Water Act by delivering excess sediment to the creek system. (Pet. 76a, 86a-88a)



peting public interests will be performed sagaciously. In this case, for example, the court found that the road would not even "materially serve several of the claimed governmental interests," and that the remaining interests "fall far short" of paramount interests. (Pet. 66a)<sup>17</sup>

**2. Whether or Not Constitutionally Justifiable, the Courts of Appeals Have Already Granted Elevated Deference by Imposing a Stringent Test to Show That Government Land Management Constitutes a Burden on Religious Exercise**

Nevertheless, however, a concern for the government's generalized interest in managing its property has *already been factored into* the test established by other courts of appeals and used in the case here to determine whether the management of public lands constitutes a constitutionally cognizable burden in the first place.

The issue was examined most recently in *Wilson v. Block*, 708 F.2d 735, 743-744. The court there said:

17. The Forest Service's enthusiasm for road-building has recently been complained of in a letter from 21 senators asking a Senate Appropriations subcommittee to cut the Forest Service's road-building budget. The letter, authored by Senator Proxmire, calls the "vast" Forest Service road network both "costly" and "environmentally damaging." Land-Use Planning Report, August 31, 1987, page 274, Business Publishers, Inc. The letter points out that in its 1988 budget request, the Forest Service asked \$327.8 million to construct or rebuild 7,600 miles of roads, although over the past four years it has built or rebuilt 2,300 more miles than it told Congress it needed in its budget request. Road construction costs contribute to the problem of below-cost timber sales, and the letter noted that the Forest Service's 1988 budget request reported losses of more than \$500 million because of below-cost sales. It is ironic that the Forest Service claims to this court that the "government interests supporting construction of the road have been strengthened" (Petitioner Brief 42; emphasis added) because Congress has now put the area into wilderness so the old jeep trail can only be used for minimum administration. It can hardly be said that there is a legitimate government interest in assisting the Forest Service to get around restraints placed on it by Congress.

"We agree with *Sequoyah's* [*Sequoyah v. TVA*, 620 F.2d 1159] resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion. We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."

The court then explained that in establishing this narrow test of a cognizable burden "we pay due regard to the government's rights and duties in its land." (*Id.* at n.5) Thus, we see that the Forest Service discretion already gets something of a "free pass" in the very beginning of the analysis, and the courts will not even look to see if the purposes asserted for Forest Service projects will be "materially served" or whether those purposes fall "far short" of compelling governmental interests unless the plaintiffs overcome a very high threshold for showing a religious burden.<sup>18</sup>

**3. The Greater Deference Which the Forest Service Seeks Here Is Even Less Justifiable Than The Proposal This Court Rejected in *Bowen v. Roy***

Earlier this year, in the context of welfare regulations, this Court firmly reiterated its rejection of a relaxed

18. The constitutional justifiability of this test is subject to question. As established by this Court, the test for whether religious practices should be relieved from the burden of government action requires that *first* the court examines whether a burden has been created, without regard for any governmental interest. Only *then* are government interests taken into account and are scrutinized to see whether the *particular* government interest is of sufficient importance and not otherwise achievable to warrant imposing the burden. (*Wisconsin v. Yoder*, 416 U.S. at 214; *Sherbert v. Verner*, 374 U.S. at 403-409) Under this traditional test, a government interest is not inserted, as logically it does not serve, to deny the existence of a burden.

standard for the required government showing to justify a burden on free exercise. (*Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. at 1049) Chief Justice Burger's opinion in *Bowen v. Roy* had proposed that "the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." (106 S.Ct. 2147, 2149)

The Chief Justice's proposal for a modification of the test was expressly limited to the context of denial of government benefit. Although such denial is indirectly coercive, it is less of a burden than direct coercion. His proposal for a lessened standard of government burden stemmed from the fact that welfare programs reach "many millions of people." *Id.* at 2156. He reasoned that a government's decision "that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries" was entitled to considerable deference. Because what is at stake is a basic constitutional liberty, however, this Court had to reject sacrificing it to a "reasonable" governmental objective; the "Court's opinions have never turned on so slender a reed." (*Id.* at 2168; concurrence and dissent by Justice O'Connor)

Here, of course, there is considerably less justification for lowering the standard for a government showing. First, the government is not just denying an economic benefit, but directly preventing the practice. Second, the Forest Service is not making rules of general application for millions of people; it is deciding how to use a particular piece of land. Moreover, both AIRFA and its own regulations (see, *infra*, p. 41, *et seq.*) require the Forest Service to gather evidence regarding whether proposed land management decisions will impair Indian religious practices. The Forest Service is *per force*, then, making case-by-case inquiries. It is essentially adjudicating a particular Indian group's religious rights when it decides to use the specific area of land es-

sentia to their practices in a way that would interfere with those practices. When it urges that a "showing of reasonableness" should suffice to support such a decision, it is asserting that it should be able to determine on an *ad hoc* basis that *any purpose at all* that is otherwise consistent with the very broad purposes for which the National Forests are managed could justify destroying the wilderness sanctuary and preventing the religious rites. This would, of course, make a nullity of the First Amendment.

Moreover, this Court has warned that "the inherently arbitrary nature" of *ad hoc* decisions offends basic notions of fairness when used as a basis for adjudicating rights of statutory origin (*Morton v. Ruiz*, 415 U.S. 199, 232), let alone basic rights of constitutional origin. Even more specifically relevant to the facts of this case, the Court reminded that such unfairness is inconsistent with the "overriding duty of our Federal Government to deal fairly with Indians. . . ." (*Id.* at 236)

Not only is there no great government interest in protecting the Forest Service's managerial prerogative in making land use decisions, there are countervailing societal interests of cultural enrichment in preserving the practice of the Yurok-Karok-Tolowa religion. Our nation values its cultural and religious diversity, even to the point of cherishing "idiosyncratic separateness" (*Wisconsin v. Yoder*, 406 U.S. at 226). The California Supreme Court pointed to these cultural values when it protected an idiosyncratic Indian religious custom of achieving religious visions through the intermediary of peyote:

"The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practice[ ] an old religion . . ."  
*People v. Woody*, 61 Cal.2d 716, 727



#### 4. The Public Forum Doctrine Cannot Be Used To Avoid The Need For Showing A Compelling State Interest

The Forest Service claims that according to the public forum doctrine, which derives from free speech challenges, they are entitled to defeat the Indians' right to use the high country for their religious practices by changing the nature of the use of the land.<sup>19</sup> It relies on language in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1982). (Petitioner's Brief at 33 n.27) We note that in *Perry* the Court was addressing a designated public forum rather than a traditional public forum, used since time immemorial. More importantly, the *Perry* opinion articulates the usual rule as it relates to speech, i.e., that "[r]easonable time, place, and manner regulations are permissible. . . ." It is noteworthy that such limitations generally do not defeat the ability to communicate one's message, although they may affect convenience, and there may be an incremental advantage in reaching a specific audience or delivering a message at a symbolic location. Religious practices, however, may not be as flexible. For example, the time of worship may be religiously prescribed. (*O'Lone v. Estate of Shabazz*, 107 S.Ct. 2400, 2406)

Accordingly, when time or place of worship are critical to a religion, prevention of the practice at the critical time or place constitutes a burden on religion which must be justified.

19. It seems ironic to discuss the law of public forum in this context, since that free speech doctrine arises from the desire to go to a place where there are other people in order to gain the advantage of a particular audience. Here, the religious requirement is to go where people are not, and to avoid an audience. However, see *United States v. Means*, 627 F.Supp. 247, 262, where the court relied on the doctrine to counter a Forest Service argument that the Lakota Indians did not need to use Forest Service land for their religious gatherings, because there was private property available for purchase in the Black Hills where they could have their gatherings.

#### C. THE INDIANS' RIGHT TO THE PRESERVATION OF THE HIGH COUNTRY IS ALSO ESTABLISHED BY THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT AND THE ADMINISTRATIVE INTERPRETATION THEREOF

In 1978 Congress passed the American Indian Religious Freedom Act out of a realization that the *ad hoc* approach which the Forest Service argues for here had historically resulted in federal violation of Indians' constitutional rights to practice their religion:

"Native Americans have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well as by many State and tribal constitutions. The practice of traditional native Indian religions, outside of the Judeo-Christian mainstream or in combination with it, is further upheld in the 1968 Indian Civil Rights Act.

"Despite these laws, a lack of U.S. governmental policy has allowed infringement in the practice of native traditional religions. (H.R. Rep. No. 1308, 95th Cong., 2d Sess. (1978) reprinted in 1978 U.S. Code Cong. & Ad. News 1262.)

Congress reported that the first of three general areas in which interference with the free exercise of native religions has taken place is in denial of access "to certain sites—a hill, a lake, or a forest glade—which are sacred to Indian religions. Ceremonies are often required to be performed in these spots. To deny access to these is analogous to preventing a non-Indian from entering his church or temple." (*Id.* at 1263.) As we have seen above, the analogy is insufficiently strong, since although a church may generally be rebuilt elsewhere, a sacred site may not be relocated. Nevertheless, it is apparent that Congress recognized access to sacred sites as a constitutionally protected right of American Indian religious practice.



Accordingly, Congress felt it necessary to affirmatively declare the policy to protect the constitutionally guaranteed freedom to exercise Indian religions, and to *describe substantively* some of those things which it felt the right included, i.e., "including but not limited to *access to sites*, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." (42 U.S.C. § 1996; emphasis added.)

It must also be inferred that Congress understood and intended that assurance of access necessarily comprehends preservation of the conditions essential to the site's sacredness. Three bases support the inference.

First, and most importantly, it cannot be assumed that Congress intended to make a mockery by assuring access to sites whose sacredness has been profaned and which has been rendered useless for the religious practices dependent on it. Permission to go to a site whose sacredness has been destroyed no more constitute access to sacred sites than permission to eat adulterated foodstuffs constitutes access to food. Moreover, an interpretation offering hollow assurance is particularly militated against by "the long-standing rule that Legislation affecting the Indians is to be construed in their interest." (*United States v. Nice*, 241 U.S. 591, 599 (1916))

Secondly, in enacting the AIRFA provision for *access* to sacred sites, the Congress looked to a California statute as precedent for such protection, saying "the State of California has enacted the Native American Historical, Cultural, and Sacred Sites Act of 1976, which takes giant strides in overcoming the problems of *access*." (1978 U.S. Code Cong. & Ad. News 1262, 1264-65; emphasis added.) Importantly, this California statute expressly includes protection of sacred sites from damage, providing as follows:

"No public agency, and no private party using public property shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States

Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require." (Cal. Pub. Res. Code, § 5097.9.)

It must be assumed that Congress intended to model the protection provided by AIRFA after that provided by the California statute and, therefore, to protect sacred sites from damage.

Thirdly, the administrative interpretation of the Act, to which courts should defer unless clearly erroneous (see, e.g., *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)) is that access *necessarily* includes preservation of the natural conditions essential to sacredness.

To make sure that AIRFA would be more than a ringing declaration and would be action-forcing, Congress required the Executive Branch to evaluate federal policy in consultation with native traditional religious leaders and to report on the evaluation to Congress within a year. The House Report explained, "[t]his section is designed to insure that a detailed analysis of the specific regulatory or procedural changes that may be necessary are identified and implemented in a systematic and thorough manner" (1978 U.S. Code Cong. & Ad. News at 1264.) Thus, it is clear that Congress intended the Task Force Report to be both (a) an administrative interpretation of the Act, i.e., a description of what administrative accommodations would be required in order to carry out AIRFA's policy of protecting freedom to exercise Native American religions and (b) a commitment to make the necessary changes in administrative procedure.

The Task Force Report asserts categorically that AIRFA's guarantee of "access to sites" comprehends the preservation of the natural qualities which are essential to the area's sacred qualities:

"Physical access to the land and its natural products must also include the preservation of the natural conditions which are the *sine qua non* of that access. The efficacy of the natural products and the spiritual well-being of the sacred sites are dependent upon physical conditions. Changing of physical conditions—the spraying and logging of trees, . . . alteration of the terrain through channelization, dams and other methods—not only damages the spiritual nature of the land, but also endangers the well-being of the Native religious practitioners in their role and religious obligation as guardians and preservers of the natural character of specific land areas." (J.A. 254)

The Forest Service itself specifically embraced the Task Force interpretation of AIRFA as requiring it to preserve sacred areas of land. This is evidenced by its issuing a directive to line management officials directing in pertinent part as follows:

"In the preparatory stage of land management planning, native traditional religious leaders will be notified of all public involvement activities and invited to provide input. If an issue concerning Indian religious freedom is identified, the cultural resource overview for the forest plan should provide substantive background on the traditional Indian religious practices within the planning area. *When examination and consultation determine a need to protect and preserve certain lands or sites, this will be accomplished in and through the land management plan.* (J.A. 250; emphasis added.)

Through the Task Force Report, the Forest Service reported to Congress (*Id.*) that this was what it was committed to do to discharge its obligations under AIRFA. The directive was in effect at the time the Forest Service made the decision to put the G-O Road through the high country. (Tr. 1318, 1320)

As this court found in *Morton v. Ruiz*, 415 U.S. 199, 237, where a federal agency "has led Congress to

believe" that it was giving the language of a statute passed for the benefit of Indians a liberal reading, it cannot subsequently be heard to argue that the language accords more limited rights. Moreover, since the Forest Service's own procedures require the preservation of land, they are bound by those procedures. The *Morton v. Ruiz* opinion articulated the rule as follows:

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. [Citations]" *Id.* at 235.<sup>20</sup>

Accordingly, the protection achieved by the District Court's injunction is no more than required by the reasonable statutory interpretation of AIRFA, required by the administrative interpretation thereof, and required by the Forest Service's own procedures.

The district court adopted the interpretation of AIRFA as requiring only that agencies "'evaluate their policies and procedures with the aim of protecting religious freedoms.'" (Pet. 71a; quoting from *Hopi Indian Tribe v. Block*, 8 ILR 3073, 3076 (D.D.C. June 15, 1981) *aff'd sub nom. Wilson v. Block*, 708 F.2d 735.) Thus, it held that the Forest Service's conduct of an ethnographic study and selection of a road route "in order to lessen the road's adverse impacts on Chimney Rock" constituted compliance with AIRFA, even though that very study conducted concluded categorically that *any route* through the high country could "destr[oy] the very core of Northwest religious beliefs and practices" (J.A. 193).

This interpretation suffers from two errors: First, the evaluation of policies required by the Act had already been

20. See, also, *United States v. Means*, 627 F.Supp. 247, 266, where the Forest Service's failure to follow a Department of Agriculture directive to promote, facilitate and issue special use permits in carrying out the provisions of AIRFA contributed to the judgment that denial of such a permit was arbitrary and capricious.

done and reported in the form of the Task Force Report wherein the Forest Service found it appropriate to require of its management that "[w]hen examination and consultation determine a need to protect or preserve certain lands or sites, this will be accomplished in and through the land management plan" (J.A. 250). Second, the Forest Service had no basis for believing that its purported "accommodation" in this case was any more than an inadequate gesture, rather like receiving information that there is a man drowning ten feet from the boat, and throwing toward his direction only a five-foot rope, because it is convenient to use the other five feet of rope for other purposes.

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### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

DATED: October 1987

Respectfully submitted,

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# REPLY BRIEF

18  
No. 86-1013

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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RICHARD E. LYNG, SECRETARY OF  
AGRICULTURE, ET AL., PETITIONERS

*v.*

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**REPLY BRIEF FOR THE PETITIONERS**

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## In the Supreme Court of the United States

OCTOBER TERM, 1987

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v.

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PROTECTIVE ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONERS

1. Respondents do not limit their presentation to a defense of the court of appeals' determination regarding the constitutional question presented in the petition; they also contend that the court of appeals' judgment should be upheld on the alternative ground, rejected by the district court (see Pet. App. 70a-71a), that the injunction barring construction of the G-O road is authorized by the American Indian Religious Freedom Act (AIRFA), Pub. L. No. 95-341, 92 Stat. 469. See Indian Resp. Br. 38; Calif. Br. 41-46; see also NCAI Br. 61-65.<sup>1</sup> Because a decision in respondents' favor on this ground would ob-

<sup>1</sup> Amicus briefs supporting respondents have been filed by the American Civil Liberties Union ("ACLU Br."), the Christian Legal Society, et al. ("CLS Br."), the American Jewish Congress and the Bureau of Catholic Indian Missions ("AJC Br."), and the National Congress of American Indians, et al. ("NCAI Br.").

viate the need for the Court to adjudicate the constitutional issue, we address the statutory question first.

The AIRFA contains two provisions.<sup>2</sup> The first declares it to be "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions \* \* \*, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites" (§ 1, 92 Stat. 469 (42 U.S.C. 1996)). Section 2 of the statute requires all federal agencies to "evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices" (92 Stat. 470 (42 U.S.C. 1996 note)). It directs the preparation of a report setting forth "the results of [this] evaluation, including any changes which were made in administrative policies and procedures, and any recommendations \* \* \* for legislative action" (*ibid.*).<sup>3</sup>

The plain language of the statute demonstrates that the AIRFA is a legislative statement of federal policy, not a substantive statute that restricts the operating authority granted to federal agencies under their organic statutes. All that Congress did in the first section of the statute was to declare a general policy; it did not direct federal agencies to take any particular action, did not specify the weight to be accorded this policy in agency decisionmaking, and did not describe the method by which this policy should be reconciled with an agency's other statutory duties. Indeed, all of the substantive obligations imposed by the AIRFA are set forth

<sup>2</sup> The statute is reprinted at Indian Resp. Br. App. 1a-3a.

<sup>3</sup> This report was released in August 1979. See U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report*.

in its second section, which mandates an evaluation of agency procedures, the modification of procedures to provide for consideration of Indian religious interests where such consideration was permissible under the agency's preexisting authority, and preparation of a report to Congress. The general statement of policy contained in the first section of the statute has no independent substantive force. Cf. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam) (National Environmental Policy Act imposes procedural requirements; it does not require federal agencies to accord extra weight to environmental factors in the decisionmaking process); *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936) (emphasis in original) (preambles to statutes "do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will" in other portions of the legislation).

The AIRFA's legislative history removes any doubt about the substantive effect of the statute. The bill that eventually became the AIRFA originated in the House of Representatives. The bill's sponsor, Representative Udall, characterized it as "a sense of Congress joint resolution, which seeks to protect the constitutional rights of native Americans to practice their traditional religion free of unwarranted governmental interference" (124 Cong. Rec. 21444 (1978)). He observed that, because of a lack of familiarity with Indians' religious beliefs and practices, Congress and federal agencies had in the past "unknowingly" infringed upon those beliefs and practices. The AIRFA was designed to ensure that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration" (*ibid.*).

Representative Udall emphasized that "it is not the intent of my bill to wipe out laws passed for the benefit

of the general public or to confer special religious rights on Indians" (124 Cong. Rec. 21444 (1978)). He concluded his remarks by reporting that he had received a letter from the Department of Justice expressing support for the bill. "The letter states that it is the Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. *That, of course, is the committee's understanding and intent.*" *Ibid.* (emphasis added); see also *id.* at 21445 (remarks of Rep. Udall) (the bill "has no teeth in it. It is the sense of the Congress"); *ibid.* (remarks of Rep. Roncalio); S. Rep. 95-709, 95th Cong., 2d Sess. 12 (1978) (noting that "no changes in existing law" were effected by the Senate version of the AIRFA).<sup>4</sup>

In view of this overwhelming evidence of congressional intent, it is clear that the AIRFA imposes no substantive limit upon agency action and therefore provides no authority for overturning the decision of a federal agency on the ground that the agency failed to accord sufficient weight to Indian religious interests. Accord *Wilson v. Block*, 708 F.2d 735, 745-747 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983); *Crow v. Gullet*, 541 F. Supp. 785,

<sup>4</sup> The evolution of the House bill provides further evidence of the nonsubstantive nature of the AIRFA. The bill originally "requir[ed] Government agencies to implement changes in the law to accommodate religious practices of Indians where infringements have been identified." 124 Cong. Rec. 21444 (1978) (remarks of Rep. Udall); see also *id.* at 21451 (similar language in Senate bill). Representative Udall amended the bill to delete that language on the ground that the implementation of changes in the law "is the responsibility of Congress" (*id.* at 21444). Representative Udall explained that "[w]here administrative changes [to agency policies and procedures] can be made, consistent with the enabling legislation, to eliminate unwarranted restrictions on Indian religion, the bill intends that appropriate changes be made. Where the underlying law is determined to be the reason for such restrictions and where these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes" (*ibid.*).

793 (D.S.D. 1982), aff'd on opinion below, 706 F.2d 856 (8th Cir.), cert. denied, 464 U.S. 977 (1983). The district court's injunction accordingly cannot be justified by reference to the AIRFA.<sup>5</sup>

2. The threshold question in assessing respondents' claim under the Free Exercise Clause is whether the challenged government action—construction of the remaining

<sup>5</sup> Respondents and amici base their interpretation of the statute upon comments made by Senator Abourezk, the sponsor of the Senate bill, during the course of hearings on the legislation. But those somewhat ambiguous comments about a bill that was not enacted—comments which themselves conflict with the description of the statute in the Senate Report (see S. Rep. 95-709, *supra*, at 12)—do not outweigh the clear expression of congressional intent by Representative Udall, the sponsor of the bill that was enacted.

California asserts (Br. 42-43) that the AIRFA incorporates the provisions of a California statute that prohibits damage to sacred lands, but the AIRFA does not contain the express limitation upon government authority set forth in the California statute. The federal statute therefore cannot be interpreted to afford the substantive protection provided by the state law. Indeed, Congress's failure to include such an express limitation upon federal authority weighs strongly against interpreting the federal statute in the manner suggested by California. California also invokes (Br. 43-46) language in the Task Force Report prepared pursuant to the AIRFA, implying that the report itself gives rise to a limitation upon government authority that is enforceable by a private party. As a threshold matter, because the statute that mandated preparation of the report does not impose substantive limits upon agency authority, it would be quite anomalous to find such substantive limits on the basis of the language in a report to Congress. In addition, the passages of the report cited by California simply recognize that the physical condition of a site may be important to Indian religious beliefs and states that those concerns should be considered in the preparation of a land management plan. Contrary to California's apparent contention, the report does not guarantee that Indian religious beliefs will be accommodated in every case, regardless of the weight of the countervailing interests. Instead, all relevant concerns must be balanced in the manner required by the statutes governing management of the public lands (see Pet. Br. 38), the precise procedure followed in the present case.



segment of the G-O road<sup>1</sup>—imposes a burden on the free exercise of religion implicating that constitutional guarantee. At the outset, it is helpful to isolate the facts that, in respondents' view, establish the burden on their free exercise rights. Respondents state that "[c]onstructing the road through the heart of the Indians' religious area will compel these traditional believers to abandon a central part of their religious teachings and will have the same effect as prohibiting these traditional practices" (Indian Resp. Br. 32-33). They thus do not argue that the government has directly prohibited any religious belief or practice.<sup>6</sup> The "prohibition" rather flows from the fact that the Indians' religious practices require "an interaction of the utmost sensitivity between the [believer] and the homogeneous, untrammelled environment, and if even 'one feature of this interaction is disturbed, the flow of power is blocked'—in sum, the practice is forcibly prevented" (Calif. Br. 20 (citation omitted)). Respondents' contention is that construction of the road segment will eliminate the natural conditions necessary for the successful completion of religious rituals and that, as a result, believers will no longer have any interest in engaging in those practices.

We argued in our opening brief (at 20-36) that these effects do not burden the free exercise of religion within the meaning of the First Amendment. In our view, the Free Exercise Clause protects individual autonomy—it is a shield against government interference with an individual's ability to shape his conduct to the dictates of his faith and to use his own resources and those of his fellow believers to further that end. This protection of individual autonomy is not implicated when—in the absence of such interference—the government declines to accede to

<sup>6</sup> Several amici assert that the construction of the road will destroy the sites at which religious observances take place, or deprive believers of access to such sites. See AJC Br. 20-23. That is not the claim advanced by respondents and it is not supported by the findings of the courts below.

an individual's demand that it use government resources or otherwise act in a manner that is consistent with that individual's religious beliefs.<sup>7</sup> Because the construction of the G-O road does not intrude upon individual autonomy—by either directly regulating individual conduct or subjecting an individual to a choice that is the equivalent of direct regulation—the protections of the Free Exercise Clause are not implicated in this case.<sup>8</sup>

<sup>7</sup> Thus, amicus ACLU has misunderstood our argument (see ACLU Br. 9-14). We do not argue that the Clause reaches government compulsion of individual conduct but not government prohibitions of individual conduct. The Clause reaches all types of government action—affirmative and prohibitory—that interferes with individual autonomy.

<sup>8</sup> California argues (Br. 19-20) that the interference with religious practice here is "even more direct" than the interference in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). But *Yoder* concerned a mandatory school attendance statute—a law that directly compelled individuals to act in a manner contrary to their beliefs. Because no such direct regulation is involved here, *Yoder* is inapposite. Indeed, the passages of *Yoder* cited by California do not even address the scope of the Free Exercise Clause. The Court was instead considering whether the objection to school attendance was rooted in religious belief. Here of course, there is no dispute that the Indians' objection to the G-O road is based in their religious beliefs. Amici CLS argue (Br. 11) that *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), is analogous to the present case. In *Kedroff*, however, the free exercise burden was direct government regulation of the ownership of the assets of a religious group. There was thus a clear government intrusion into the sphere of individual autonomy protected by the Free Exercise Clause. Finally, California asserts (Br. 23-24) that the present case resembles those concerning denials of prisoners' access to religious books and services. But those prisoners lost access to those materials only because of their confinement under government control. Thus, in contrast to the present case, the free exercise burden flows from government intrusion into the prisoners' individual autonomy.

Respondents and amici also invoke decisions of the courts of appeals to show that the free exercise burden that they assert is well recognized. As we showed in our certiorari petition (at 15-

a. We argued more specifically in our opening brief (at 24-25, 27-29), that respondents' free exercise claim founders upon this Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986). The plaintiffs in *Roy* argued that the government's use of a social security number to identify their daughter would "serve to 'rob [her] spirit' \* \* \* and prevent her from attaining greater spiritual power" (*id.* at 696). Eight Justices agreed that the plaintiffs had not made out a burden on their free exercise rights. The Court stated that the Free Exercise Clause does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development"; the Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government" (*id.* at 699-700 (emphasis in original; citation omitted)). The Court thus recognized that the Clause is implicated only when government infringes individual autonomy by coercing action inconsistent with religious beliefs. See *id.* at 701 n.6 (characterizing the decision as resting on the distinction between "individual and governmental conduct").<sup>9</sup>

18), however, other courts of appeals have specifically rejected the argument advanced by respondents here.

<sup>9</sup> This conception of the scope of the Free Exercise Clause is eminently sensible. First, it reflects the familiar distinction between positive and negative rights. Like the First Amendment's free speech guarantee, the Fourth Amendment's protection against unreasonable searches and seizures, and many other constitutional rights, the Clause protects the individual against government interference with his ability to enjoy that right, it does not confer an affirmative entitlement to demand the government's assistance in exercising the right. Cf. *Harris v. McRae*, 448 U.S. 297 (1980).

Second, this delineation of the scope of the Free Exercise Clause provides an objective limitation upon the reach of the Clause. Unlike, for example, the "speech" protected by the Free Speech Clause, which can be defined objectively by this Court, the definition of the "religion" protected by the Free Exercise Clause is left

Respondents and amici argue that the Court drew a different line in *Roy*, and they attempt to distinguish that decision on a variety of grounds. First, they contend that construction of the G-O road threatens the continuation of the religion itself and therefore would result in "a significantly greater infringement on religious liberty than the purely informational requirement at issue in *Roy*" (Indian Resp. Br. 33). This distinction rests upon the very sort of cultural bias that respondents themselves attack (see Calif. Br. 28-29). The plaintiffs in *Roy* stated that their "objection to the use of the [social security number] cannot be compromised; to do so would shatter the very foundation of their beliefs" (Appellees Br. at 3, *Bowen v. Roy*, *supra*). They stated that use of the social security number would cause their daughter to "los[e] control over her spirit" and that they would be "powerless to undo the harm" and "unable to prepare their youngest daughter for greater spiritual power." *Id.* at 4; see also *Bowen v. Roy*, 476 U.S. at 696. Therefore, to the plaintiffs in *Roy*, the burden upon religion was every bit as serious as the burden asserted by respondents here.

Moreover, the Court has never held that the *degree* of interference with religion is relevant in determining whether government action implicates the Free Exercise Clause. We do not believe that such a rule has any place in free exercise analysis. The Clause's protection should

entirely to the subjective views of each individual. See, e.g., *Thomas v. Review Board*, 450 U.S. 707, 714-716 (1981); Pet. Br. 30. If the definition of a cognizable burden is also left entirely to the individual's subjective views, the Clause will be essentially limitless. An individual's good faith declaration that a particular government activity is so inconsistent with his beliefs that its continuation would cause him to lose his faith altogether would always be sufficient to establish a free exercise burden. A limit drawn by reference to the objective impact of the government action upon the individual provides a clear boundary for the Clause's scope. See Pet. Br. 28-31.



not turn upon the relative importance of the religion-based conduct interfered with by the government: any intrusion should be sufficient to trigger the Clause's protection.

Further, a "degree of burden" test would have little effect on the free exercise inquiry. Because courts may not second-guess an individual's stated religious beliefs (see Pet. Br. 30), there is no basis on which to undertake an objective inquiry into the burden imposed by particular government action. Rather, the court must take the believer at his word, and a believer is likely to commence litigation against the government only when the challenged government action cuts deeply against his religious beliefs.

California suggests (Br. 20-22) that a free exercise burden has been established here because the construction of the road segment will, as a practical matter, lead believers to cease their religious practices. See page 6, *supra*. But the fact that believers will choose not to engage in religious practices because of their subjective view of the impact of government action cannot be sufficient to bring within the Free Exercise Clause government action not otherwise implicating the Clause. If such an "effect" were constitutionally relevant, any government action could be made subject to free exercise scrutiny by a sincere assertion that the government action would cause the believer to lose his faith. Indeed, the plaintiffs in *Roy* claimed that the government's use of the social security number would force them to abandon efforts to nurture their daughter's spirit (see page 9, *supra*), a contention that undoubtedly encompassed the abandonment of certain religious rituals, but the Court did not view that fact as significant in the free exercise analysis.

Respondents also assert that *Roy* applies to "government actions which take place at a location isolated from where religious practices are conducted," but not to

"government actions which intrude destructively on the only location where the practices can be carried out." Calif. Br. 18; see also Indian Resp. Br. 33-34 (*Roy* is inapplicable because the present case does not involve "internal government practices"). Surely the fact that the social security program is administered in federal office buildings while the final segment of the G-O road is to be constructed on open federal land is a distinction without a difference. In both situations, believers claim the destruction of conditions necessary for effective religious practice by virtue of something the government has done in managing its own procedures or property, without any intrusion into the individual's sphere of autonomy. The linkage between the natural environment and spiritual accomplishment may be more comprehensible to an unbeliever than the spiritual impact of the use of a social security number, but the availability of constitutional protection cannot be allowed to turn on the plausibility to unbelievers of the particular claim being advanced. The only approach consistent with the Constitution's mandate of equal treatment of all religions is to treat these essentially indistinguishable claims in the same manner. Accordingly, this ground for distinguishing *Roy* should be rejected.

Indeed, far from providing a favorable basis for distinguishing *Roy*, the fact that respondents' claim relates to the public lands puts them in an even less favorable position than the plaintiffs in *Roy*. What respondents assert is essentially a constitutionally compelled easement entitling them to limit the uses of a substantial area of publicly-owned lands. We showed in our opening brief (at 31-33) that the Constitution does not require that result. Indeed, in view of the widespread existence of land-based religious beliefs similar to those involved here (see NCAI Br. 8-16, App. A), a contrary conclusion would work a dramatic reduction in the government's



authority to manage the public lands. See Pet. Br. 29-30 & n.25.<sup>10</sup>

b. Respondents argue (Indian Resp. Br. 34-38) that this Court's decisions interpreting the Free Exercise Clause are not controlling in this case. Invoking the American Indian Religious Freedom Act, respondents assert that Congress has concluded that claims such as the one advanced here are cognizable under the Free Exercise Clause and that this Court should adopt the congressional definition of the scope of the Clause.

However, Congress did not express a particular view regarding the scope of the Free Exercise Clause when it enacted the AIRFA.<sup>11</sup> The language of the statute and its legislative history indicate that Congress's intent was to make clear that Indian religions were entitled to the same protection under the Free Exercise Clause as that available to other religions, and that government decision-makers accordingly should consider the effect of their

<sup>10</sup> California asserts (Br. 26-29) that several statutes permit religious uses of public lands and that the government assists "mainstream" religions in other ways; it contends that the failure to accommodate the Indians' religious claim here would constitute discrimination violative of the Establishment Clause. Respondents did not previously challenge the construction of the road on Establishment Clause grounds and this argument therefore is not properly before the Court. In any event, the rights in public land asserted by respondents go far beyond the examples of accommodation cited by California.

<sup>11</sup> This Court has recognized that Congress's determination in the course of its legislative deliberations that a statute comports with the Constitution is entitled to deference when a court is subsequently confronted with a constitutional challenge to the statute. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981). Respondents here, however, do not argue that Congress made a determination regarding the constitutionality of the AIRFA. They rather assert that Congress enacted that statute in order to announce its view regarding the scope of the Free Exercise Clause and that deference must be accorded to Congress's interpretation of that constitutional provision.

actions on those religions. See pages 2-4, *supra*; 124 Cong. Rec. 21444 (1978) (remarks of Rep. Udall); S. Rep. 95-709, *supra*, at 6. Congress's sole point was that the Free Exercise Clause protects Indian religions to the same extent that it protects other religions; Congress did not undertake to define all of the circumstances in which the Free Exercise Clause might apply. Cf. *Bowen v. Roy*, 476 U.S. at 700 (the AIRFA "accurately identifies the mission of the Free Exercise Clause itself").

Further, insofar as Congress did express concern for the free exercise of Indian religion, that expression did not extend to claims such as the one advanced here. The Act refers to the "inherent right of freedom to believe, express, and exercise \* \* \* traditional religions \* \* \*, including but not limited to access to sites" (92 Stat. 469 (42 U.S.C. 1996)). It thus refers to access to religious sites, but does not address religion-based claims to the maintenance of federal land in its natural state. And the legislative history makes clear that Congress's concern was limited to access. The House Report stated that Indians had been prevented "from entering onto these [public] lands. *The issue is not ownership or protection of the lands involved.* Rather, it is a straightforward question of access in order to worship and perform the necessary rites." H.R. Rep. 95-1308, 95th Cong., 2d Sess. 2 (1978) (emphasis added); see also S. Rep. 95-709, *supra*, at 2-3.<sup>12</sup>

Finally, even if Congress could be said to have concluded that claims such as those of respondents do implicate the Free Exercise Clause, that conclusion would merit consideration by this Court but would not be bind-

<sup>12</sup> To be sure, as respondents note (Indian Resp. Br. 37), the Task Force Report prepared pursuant to the AIRFA recognized that the maintenance of land in its natural state is important to Indian religious beliefs (see J.A. 251-254). But a statement in a report prepared by federal agencies certainly is not the equivalent of a congressional finding. In addition, the report does not purport to define the scope of the Free Exercise Clause.

ing. We submit, moreover, that the degree of deference due Congress is less where its determination is not made in the context of considering the constitutionality of a substantive statute, but is rather a free floating attempt to define a constitutional right. Thus, even if the AIRFA is relevant to the issue before the Court, it should not alter the outcome of the constitutional analysis under this Court's decisions.

c. Respondents speculate (Indian Resp. Br. 38) that our position would eliminate all protection for Indian religions under the Free Exercise Clause. Nothing could be farther from the truth. Respondents and amici proffer a number of examples of governmental actions that interfere with religion-based conduct. Those government actions—such as prohibitions against the use and possession of peyote, and regulation of Indian religious ceremonies—all would constitute burdens on the free exercise of religion under our interpretation of the Clause. The line that we draw does not distinguish between types of religions; it only distinguishes between different types of government actions—those that intrude upon individual autonomy and those that do not.

The primary thrust of respondents' and amici's arguments is, in fact, that Indian religions should be accorded a special status under the Free Exercise Clause. They argue that the government's historic treatment of Indians weighs in favor of recognizing a special constitutional status for claims regarding the management of public lands that are based in Indian religious belief. Calif. Br. 25-26; see also NCAI Br. 42-44; AJC Br. 36-38. But the Free Exercise Clause applies equally to all religions. There simply is no basis for interpreting the Constitution itself to compel the government to grant a special preference to Indian religions.<sup>13</sup> Indeed, Con-

<sup>13</sup> While the political Branches undoubtedly have the authority to accommodate Indian religion, that authority is not rooted in the Free Exercise Clause, but rather flows from Congress's authority to legislate with respect to Indian affairs.

gress specifically rejected that approach when it enacted the AIRFA. Representative Udall stated that it was not Congress's intent to "confer special religious rights on Indians." 124 Cong. Rec. 21444 (1978); see also S. Rep. 95-709, *supra*, at 6. This Court should not take the very step that Congress itself has rejected.

d. Respondents also assert (Calif. Br. 29-31) that the completion of the G-O road implicates the First Amendment because it "tends to exhibit hostility" toward the Indians' religion. Purposeful discrimination by government on religious grounds is plainly unconstitutional, but respondents do not claim that the decision to construct the road is an act of purposeful discrimination (see Calif. Br. 22) and, in any event, there is nothing in the record to support such a claim.

Respondents instead contend that the decision to construct the road, with knowledge of the impact of that construction upon the Indians' religious beliefs, evidences hostility or "callous indifference" to religion that calls the Free Exercise Clause into play (Calif. Br. 31). That theory is nothing more than a device for transforming every religion-based objection to government action into a claim cognizable under the Free Exercise Clause. Once the objection is raised, the government's failure to provide the requested relief can be characterized as "callous," and proffered as a basis for constitutional scrutiny. Nothing in the Constitution or this Court's decisions supports that result.

3. If the Court concludes, contrary to our submission, that the construction of the G-O road constitutes a burden cognizable under the Free Exercise Clause, the next inquiry is whether the proposed action is permissible despite its impact upon constitutionally protected rights. We argued in our opening brief (at 37-43) that the appropriate standard is whether the government acted reasonably in deciding to undertake the challenged action despite the adverse effect on religious interests.<sup>14</sup>

<sup>14</sup> Thus, contrary to the rather extravagant assertions of California (Br. 38-39) and some amici (AJC Br. 39-44, 55-56; NCAI



Respondents and amici contend that the traditional compelling interest standard should be applied to determine whether the G-O road may be constructed despite the burden on free exercise rights. They intimate that our proposed standard would effect an unprecedented reduction in the protection accorded to free exercise rights. But this Court has already held that the showing required to justify government action that burdens free exercise rights may be adjusted to take account of the factual context in which the claim is asserted. In *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987), the Court considered the standard to be applied in evaluating a free exercise claim asserted by a prisoner. The Court observed that "limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives"; it stated that "evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination'" (slip op. 5 (citation omitted)). The Court concluded that "[t]o ensure that courts afford appropriate deference to prison officials, . . . prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Ibid.*; see also *Goldman v. Weinberger*, 475 U.S. 503 (1986).<sup>15</sup>

Br. 50-51), we do not argue that government action is immune from judicial review or that only procedural constraints are imposed upon government decisionmakers. Our contention is simply that in this particular factual context—decisions concerning the physical development of federally-owned lands—a particularized showing of reasonableness is sufficient to permit the government action to go forward.

<sup>15</sup> California is thus incorrect in contending (Br. 32-33) that it is somehow improper to consider the context in which a constitutional right is asserted when selecting the standard to be used in ascertaining the sufficiency of the government interest.

We argued in our opening brief (at 37-43) that analogous considerations warrant the application of a reasonableness standard in the present context. First, as we have discussed, the free exercise burden asserted here is different than any previously recognized by this Court and, we submit, of a somewhat lesser magnitude because it does not represent an intrusion into individual autonomy. Second, unlike other resources, each parcel of land is unique. As a landowner, the federal government has a weighty interest in ensuring that each parcel of land is put to its highest and best use, as measured by the land management criteria specified by Congress.<sup>16</sup> A reasonableness standard properly reconciles the relative weight of these two interests.<sup>17</sup>

Respondents and amici argue that decisions regarding management of public land are indistinguishable from other government decisions. They observe that the federal government is a large landholder and assert that most conflicts between religious claims and government actions can be accommodated by moving the government project to a different parcel of federally owned land. In their view, decisions about federal land use are no different than decisions about the allocation of funds in the federal budget and therefore should not be measured against a more deferential constitutional standard. *Indian Resp. Br.* 40-41 n.23; *Calif. Br.* 34-36; *AJC Br.* 48-54; *NCAI Br.* 52-53; *ACLU Br.* 23-26.

While it certainly is true that federal landholdings are extensive, particularly in the western areas of the United

<sup>16</sup> Indeed, this Court has already recognized in the free speech context that extra weight should be accorded to the government's interest as a landholder. See *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985); *Pet. Br.* 38-39.

<sup>17</sup> Respondents assert (*Indian Resp. Br.* 39; *Calif. Br.* 37-38) that the standard we propose was rejected in *Hobbie v. Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), but that case concerned a condition upon unemployment benefits. The Court had no occasion to address the standard to be applied to a religion-based objection to development of public land.



States, the availability of other land does not alter the fact that each particular parcel of land cannot be duplicated, and that a decision about the use to be made of a parcel forecloses all incompatible uses. Here, for example, the failure to construct the road will reduce public access to this entire area of the national forest, substantially curtailing recreational use of this land. While it is true that other recreational sites are available, use of this land—which the Forest Service has found to be suitable for recreation activities—would be made more difficult. Moreover, respondents' contention that alternative sites on federal land will always be available ignores the fact that other objections—on religious or other grounds—could be raised by other interested parties. Such a restriction on the government would result in a considerable reduction in land management options, and might well force substantial deviations from the land management criteria specified by Congress and foreclose appropriate competing uses for the land in question. Land management decisions thus cannot be analogized to decisions allocating federal funds. The unique nature of land and the weight accorded to the government's interest as a property owner require a different constitutional standard.

Respondents also argue (Indian Resp. Br. 40-41 & n.24) that the factors relevant in public forum analysis under the Free Speech Clause weigh in favor of a compelling interest standard here. Respondents contend that the land at issue here is the equivalent of a traditional public forum because it has long been used for religious purposes. But permitting the length of religious use to control the degree of constitutional scrutiny would establish an express preference for older religions over new ones, a type of discrimination forbidden by the Free Exercise Clause. Thus, the length of religious use would not be a proper criterion in selecting the free exercise standard. We submit that the appropriate use of the public forum doctrine is as a guidepost in assessing the

weight of the government's interest. Because the government's interest in controlling the physical management of its property is so substantial, a reasonableness standard is appropriate here. See Pet. Br. 40-41.

Respondents also assert (Indian Resp. Br. 42; Calif. Br. 36-37) that an adjustment of the compelling interest standard is not necessary because the test applied by the courts of appeals in the public land context, which requires a plaintiff to show that the land is "central and indispensable" to his religion, affords sufficient protection to the government's interest as a landowner.<sup>18</sup> We do not believe that the "central and indispensable" standard is justified under the Free Exercise Clause. As we have discussed (pages 9-10, *supra*), this Court has never limited the Clause's protection to "central" religious practices; if the Clause extends to government land decisions such as the decision at issue here, there is no reason to believe that protection is limited in this manner. Moreover, the standard is unlikely to provide any practical protection at all for the government because a court would be bound by a plaintiff's claim that particular land is "central" to his religion (see page 10, *supra*).

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed in pertinent part and the case remanded for further proceedings.

Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

NOVEMBER 1987

<sup>18</sup> At the same time that it makes this argument, California states that "[t]he constitutional justifiability of this test is subject to question" (Br. 37 n.18), a position that is somewhat inconsistent with the notion that this requirement will actually protect the government's interest.

**AMICUS CURIAE**

**BRIEF**

6  
No. 86-1013

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**

October Term, 1986

RICHARD E. LYNNG, SECRETARY OF  
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*Petitioners,*

v.

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, *et al.*,

*Respondents.*

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DEVELOPMENT CORPORATION, THE CRESCENT  
CITY-DEL NORTE CHAMBER OF COMMERCE, AND  
DEL NORTE TAXPAYERS LEAGUE IN SUPPORT  
OF PETITIONERS**

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**OPINIONS BELOW**

The decision of the United States District Court for the Northern District of California is reported in *Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983). The Ninth



Circuit originally decided the case on June 24, 1985, but withdrew the decision, granted a rehearing, and decided the case as reported in *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (9th Cir. 1986). Both opinions are reproduced in government-petitioners' appendix to petition for writ of certiorari.

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### STATEMENT OF THE CASE

This case stems from the long struggle of the Forest Service and local community to complete the paving of an all-weather road linking the communities of Gasquet and Orleans. In addition to linking the two communities, the road will provide for the economical harvesting of additional timber reserves, augment access to the national forest for recreational and spiritual purposes, and increase Forest Service efficiency in managing its lands.

The opponents of this road have long fought its construction citing a variety of rationales for their advocacy of nondevelopment. To accommodate the religious needs of some of the local inhabitants the Forest Service designed the road and its accompanying timber plan<sup>1</sup> with buffer zones and an environmentally sensitive design in order to eliminate impacts on the local Native American religious ceremonies. However, despite this accommodation, the opponents of the road pressed on, and succeeded in convincing the courts below that no road should ever

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<sup>1</sup> The timber plan is not a part of this appeal.

be built in this region, and that the entire "high country" should forevermore be maintained for the single purpose of a sanctuary for wilderness and religious ceremonies. This permanent judicial lockup of the region for religious purposes is contrary to the intent of Congress when it authorized road construction, the management decisions of the Forest Service, and the many local interests that would benefit tremendously from the road and that actively support its construction. Indeed, what has happened in this case is not the necessary and proper accommodation of religious worship, which was more than adequately protected by the Forest Service plan, but instead is the set-aside of a substantial acreage of public land for a religious sanctuary. This permanent dedication of public lands for a solely religious purpose stems from an extraordinary misreading of the Infringement Clause of the First Amendment to the United States Constitution and should be reversed.<sup>2</sup>

The Solicitor General petitioned this Court on behalf of Richard E. Lyng, Secretary of Agriculture, *et al.*, for a writ of certiorari which has been granted. Howonquet Community Association, *et al.*, which collectively represent a broad range of community groups and organizations in Del Norte County with vital interests in the completion of the disputed road, filed an amicus curiae brief supporting the government's petition. Amici have obtained permission from all parties to file this brief

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<sup>2</sup> Although the government's petition is not primarily based upon Establishment Clause issues, it should be noted that this religious sanctuary set-aside raises the serious question of whether the lower courts' decisions create an unlawful establishment of religion.

amicus curiae on the merits of the case in support of government-petitioners. This filing is in accordance with Supreme Court Rule No. 36.2. Letters of consent have been lodged with the clerk of the Court.

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### **JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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### **INTERESTS OF AMICI**

The interests of amici are described fully in parts I(A) through I(F) of the argument below.

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### **SUMMARY OF ARGUMENT**

The decision of the Ninth Circuit Court of Appeals should be reversed for the following reasons:

1. The injunction setting aside this religious sanctuary failed to consider the broad public interests in favor of construction of the G-O Road.

2. The court's set-aside of a substantial portion of the public land for a religious sanctuary is contrary to the spirit and intent of federal statutes. The federal laws that created and expanded the Redwood Region National Park intended that the road be built and the Multiple

Use and Sustained Yield Act of 1960 gives the Forest Service broad management authority over the national forests.

3. The court's creation of a religious sanctuary is in conflict with the law of other circuits. By failing to ask seriously whether the minimal intrusion represented by the road, with its substantial mitigation measures, actually causes a religious infringement, by failing to consider the true nature and extent of religious practices on the public lands, and by failing to balance other justifications for road construction, the Ninth Circuit established a dangerous precedent for the creation of public land religious sanctuaries when there is no real infringement of First Amendment rights.

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### **ARGUMENT**

#### **I**

#### **THE COURTS BELOW FAILED TO PROPERLY WEIGH THE SUBSTANTIAL PUBLIC BENEFITS THAT WILL RESULT FROM THE COMPLETION OF THE ROAD**

The courts below enjoined the United States Forest Service from completing the G-O Road despite the substantial public and community needs for the road project. Howonquet, *et al.*, represent virtually every segment of the community in Del Norte County and environs, and it is

apparent to these amici that the road will be of great benefit to the community. Yet, the courts below and opponents of the road have entirely ignored these interests.

This Court has consistently held that in deciding whether or not to grant an injunction, *all* of the equities must be weighed. *See, e.g., Amoco Production Company v. Village of Gambell*, 55 U.S.L.W. 4355, 4358 (March 24, 1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

In a nutshell, the G-O Road would provide the only practical corridor for transportation between the communities of Gasquet and Orleans, California. The road used to exist as an unpaved route that was not readily traversable by highway vehicles without four-wheel drive. Rerouting and paving the road was essential to complete the transportation network between the towns. In 1985 Congress placed the area containing the uncompleted segment into wilderness. As a result the road cannot be maintained, has fallen into complete disrepair, and has been blocked off for safety reasons. Now more than ever, the G-O Road project is essential. Following is a description of the amici and the specific interests of amici that should be considered when a final decision is made on whether or not to enjoin the G-O Road reconstruction.

#### **A. The Howonquet Community Association**

The Howonquet Community Association is an Indian rancheria (terminated status under reconsideration) located north of Crescent City, California, which consists of 28 Native American families, with over 100 individuals, belonging to the Tolowa Tribe. The members of this rancheria currently suffer from very high unemployment

(over 90%) and would greatly benefit from any increased job opportunities that will become available if the G-O Road is completed. In addition, members of the Howonquet Community Association will be benefited by the increased access into the forest for recreational and religious purposes. The Howonquet Community Association is in support of the completion of the G-O Road so long as the road is compatible with the practice of their religious beliefs. The members of the Howonquet Community Association believe that the G-O Road can be compatible with their religious beliefs provided that the Forest Service respects its proposed buffer zone and does not interfere with the members' privacy during the conduct of religious ceremonies during certain periods of the year. This amicus does not believe that the injunction against the G-O Road is either necessary or in its best interest.

#### **B. Carpenters' Union Local 1040**

The Carpenters' Union Local 1040 has approximately 350 members in Humboldt and Del Norte Counties many of whom are economically dependent upon the continuing availability of timber harvesting in the Six Rivers National Forest. They have been adversely affected by the extremely high unemployment rates in Del Norte County which exceeded 20% at time of trial.

#### **C. The Area Independent Development Corporation**

The Area Independent Development Corporation is a local development corporation formed pursuant to the Small Business Investment Act. The purpose of the Area Independent Development Corporation is to foster and



promote the economic development of Del Norte County. The purposes of this corporation will be greatly facilitated if the G-O Road is completed.

#### **D. The Tri-Agency Economic Development Authority**

The Tri-Agency Economic Development Authority consists of three governmental bodies: The County of Del Norte, the City of Crescent City, and the Crescent City Harbor District. This organization is designed to coordinate and foster economic development within the County of Del Norte. This organization believes that it is essential to the future well-being of the county that the G-O Road be completed so that the county may find some relief from its severely depressed economic circumstances.

#### **E. Crescent City-Del Norte Chamber of Commerce**

The Crescent City-Del Norte Chamber of Commerce is a voluntary organization composed of independent businesses throughout Del Norte County. The interests of the various members of the Chamber of Commerce will be directly affected by the disposition of this appeal. Its members require the renewal of a healthy economic environment in Del Norte County for their continued existence. Members of the Crescent City-Del Norte Chamber of Commerce will be directly affected by the health of the local forest industry which in turn is directly dependent on the completion of the G-O Road. According to the environmental impact statement (EIS) the completion of the G-O Road will greatly enhance the economic viability of the forest industry in Del Norte County. The EIS is generally described in the Ninth Circuit's opinion. See government-petitioners' appendix at 3a-4a.

In the EIS it is stated that the road will reduce the transportation costs to appraisal points by \$16 per 1,000 board feet. The road will also result in a fuel consumption savings of approximately 1,196,000 gallons over the next 30 years or 40,000 gallons per year. These significant savings will allow the haulage of timber from the Six Rivers National Forest that otherwise would be uneconomic to harvest.

The businesses represented by amicus chamber of commerce, and other businesses in Humboldt County as well, simply cannot harvest as much timber without the road. Indeed, the Humboldt County Board of Supervisors has endorsed the completion of the G-O Road. Furthermore, the EIS estimates that with completion of the road the Del Norte economy will be the recipient of \$2,528,000 directly from the timber harvesting and an estimated \$4,648,000 in total earnings when multipliers for support services are factored in.

The Ninth Circuit believed that the increase in jobs would be nothing more than the transfer of jobs from one part of California to another. However, the significant reduction in haulage costs from the road will enable the harvesting of much timber that could not be transported economically to Humboldt County for market preparation. This will create an overall increase in jobs. For a maximum utilization of the timber reserves in Six Rivers National Forest the G-O Road must be built.

#### **F. Del Norte Taxpayers League**

The Del Norte Taxpayers League consists of approximately 275 members including individuals, business corporations, and associations. The goal of the league is to

ensure the greatest possible economies consistent with efficiency in the collection and expenditures of public moneys. Members also have children in schools which are supported in part by forest reserves. Many members are employed in the logging industry and support businesses.

The members of this organization have a strong interest in the renewed health of the forest industry of Del Norte County. For many years the County of Del Norte has been the recipient of substantial revenues derived from the taxation of forest products by virtue of 16 U.S.C. § 500 which provides that the county within whose jurisdiction a national forest is located shares 25% of the national forest's receipts on timber harvesting. The EIS shows for example that in 1977 23.6% of the county's income was derived from operations of the Six Rivers National Forest which covers 67% of the county's land area. EIS at 29. In the transcript of the trial proceedings for March 29, 1983, at Page No. 1492, Ernest Perry, Del Norte County's director of building and planning, testified that in the 1979-80 fiscal year \$1,228,000 was received from the national forest receipts of which \$940,000 was directed to a general fund for schools, \$184,000 to a school service fund, and \$104,000 to the county's junior college. Mr. Joseph H. Harn, the forest supervisor for the Six Rivers National Forest, testified on March 28, 1983, that if the G-O Road were completed there would be a better return to *all* counties involved because transportation costs would be reduced, more timber collected, and therefore higher school revenue funds would be collected. *See* transcript at 1249, 1253, and 1298.

In addition to the funds derived from 16 U.S.C. § 500, the county also receives a yield tax payments that are

levied on timber operators by the state. This rate is set each year and at the time of trial was 8.1% of the harvest value.

The interests of amici in favor of the completion of the G-O Road as planned are manifest. The road will not only allow the revitalization of a devastated forest economy, but is compatible with amicus Howonquet's practice of religious beliefs. The amici's vital stake in the road must be considered when this Court hears this appeal and decides whether the judicial creation of a public land religious sanctuary, at public expense, warrants the sacrifice of the public's interest in favor of the completion of the G-O Road.

## II

### **THE COURT'S SET-ASIDE OF A SUBSTANTIAL PORTION OF THE PUBLIC LANDS FOR A RELIGIOUS SANCTUARY IS CONTRARY TO FEDERAL LAW**

When the Redwood National Park was created in 1968, Congress intended to mitigate the substantial loss of redwood timber harvesting revenues and jobs through the accelerated development of timber harvesting in the Six Rivers National Forest. In its report on the Redwood National Park Bill, which was to become 16 U.S.C. § 79a, *et seq.*, the Senate Committee on Interior and Insular Affairs made several references to a road development program in the Six Rivers National Forest. *See* Senate Comm. on Interior and Insular Affairs, Rep. No. 641, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3913, 3919, 3925. The Senate committee included a letter from then-Governor Reagan stating "it has been argued by the Forest Service that an increased

timber cut in the Six Rivers National Forest would eventually compensate [for the loss of timber operations in the Redwood National Park]." *Id.* at 3919. The Senate committee report continues that "with a capital investment of \$11 million for the new road construction and reconstruction the Forest Service could make available an increased cut." *Id.* at 3925. It was well understood that the G-O Road would be completed in order to mitigate the economic damage resulting from the creation of the Redwood National Park. By enjoining the construction of the G-O Road, the courts below have acted contrary to the intent of Congress and have frustrated the economic development of the region.

Furthermore, the Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528, declares: "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Prohibition of the forest road in this case will result in the preclusion and inhibition of other forest uses, including timber and recreation, for the express purpose of maintaining a religious sanctuary. This single purpose use set-aside is contrary to the letter and spirit of the Multiple Use Sustained Yield Act and, as will be seen, is not justified by any allegations of religious infringement.

### III

#### **THERE IS NO INFRINGEMENT OF RELIGION THAT JUSTIFIES THE COURT'S CREATION OF A RELIGIOUS SANCTUARY**

Native American religious ceremonies often involve the use of a particular area of land or geographic feature in

sacred rites. This unique requirement of land-based religious worship gives rise to an inherent conflict between the exercise of First Amendment rights and other legitimate uses of the public lands. When other courts or agencies have been confronted with this problem they uniformly attempted to accommodate the religious requirements of Native Americans. They did not, as did the courts below in this case, work a wholesale sacrifice of valuable public lands for a single purpose religious sanctuary. There is nothing in the First Amendment or in its history that would call for such a single-use religious sanctuary to be created out of the public lands. If it did American history would have been quite different, necessary accommodations could not have been reached, and the settlement and forging of a great nation would have been highly improbable. And, if the court's decision is carried to its logical conclusion, there could be no end to the unbalanced abandonment of past, present, and future developments on public lands in order to satisfy a hyper-technical reading of the Infringement Clause. As it stands today, the court's decision and failure to balance competing interests is standing in the way of significant economic opportunities for many members of the community.

Other courts which have taken a more reasoned approach to this problem have come to conclusions opposite those of the Ninth Circuit for two principal reasons: First, they have been chary to uncritically and too readily find an infringement upon the practice of religion where no such infringement exists and, second, they have been reluctant to violate the establishment prong of the First Amendment. If the courts below in this case had as carefully weighed the effects of the G-O Road and the



consequences of setting aside the territory as a religious sanctuary, then a different conclusion would have been reached consistent with the rulings of the other circuits and the need to carefully balance competing uses of our public lands.

**A. The G-O Road Would Impose No Significant Burden on the Respondents' Free Exercise of Religion**

The burden upon an individual's free exercise of religion, imposed by government action, must be significant in order to trigger further consideration of the Free Exercise Clause. Amicus, Howonquet Community Association, certainly does not believe the road will work an infringement, but instead believes a properly constructed road will only add to the possibility that its members will be able to work for a living. Two factors are significant in determining whether an alleged burden on the free exercise of religion exists: First, the burden must be on a central or at least an indispensable tenet of the religion in question; secondly, where site-specific religious practices are involved a burden is more significant when the complaining parties have some sort of property interest in that area. *See, e.g., Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

Several recent cases have clearly held that Native Americans have no cognizable free exercise claim when they are unable to demonstrate that a challenged government action adversely affects a central aspect of their religion. For example, in *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980), Cherokee Indian

plaintiffs attempted to block the completion of the Tellico Dam, better known as the home of the snail darter, on grounds that the dam would flood their "sacred homeland." *Id.* at 1160. Because the valley was not shown to play a "central role" in the religion, however, no significant burden was found to exist. *Id.* at 1164. It should be noted that the proposed action, the flooding of the valley, would surely have burdened the Cherokees' religious practices if that valley had been central to their religion. Here, the respondents have *not* shown that the *mitigated* road would touch or affect any area *central* to their religion.

Other courts have looked to see whether a government action blocks access to land "indispensable" to the practice of the religion. For example, in *Wilson v. Block*, 708 F.2d at 735, the court found that the land on which the Snow Bowl Ski Area was built had to be indispensable, whether or not central, to some religious practice for there to be a free exercise burden. *Id.* at 743. It was not in that case. *Id.* at 744-45. Likewise, in *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), the court found a ban on overnight camping in a park did not affect an indispensable religious practice. *Id.* at 792.

In the case under consideration, the respondents have not shown any denial of access to land which creates any significant burden on their religion. While the courts below found that use of the high country was "central and indispensable" to the Indian respondents' religion neither the respondents nor the courts demonstrated that the construction of the G-O Road as mitigated would degrade

the high country, access to it, or actually intrude upon the sanctity of the high country. See *Northwest Indian Cemetery Protective Association v. Peterson*, petitioners' appendix at 22a-37a (Beezer, J., dissenting). Indeed the Forest Service chose an alternative plan with large buffer zones around its operation in order to preserve the pristine environment and opportunity for solitude. Thus, while the high country itself may arguably be central or indispensable to the Indian religious practices, there has been no showing that the use of that high country will be significantly burdened by the Forest Service road. The Forest Service, after carefully weighing all of the evidence (see EIS) reasoned that its plan would not infringe upon religious practices. No evidence has been presented that establishes that the road, as planned by the Forest Service, would so significantly reduce the area's isolation that there would be any interference with religious practices. Instead, the courts have substituted their judgment for that of the Forest Service. Simply put, the courts below seem to have found an infringement where none exists.

Furthermore, the respondents have no property interest in the high country. It is national forest land held by the United States government for the benefit of all its citizens. The issue of the importance of a property interest to be a sacred area is unsettled. Some courts have implied it to be a prerequisite to establishing a burden on the practice of site-centered religious practices. See *Crow v. Gullet*, 541 F. Supp. at 794. Other courts have found a property interest not necessary but a factor in considering a free exercise claim. See, e.g., *Sequoyah v. Tennessee Valley Authority*, 620 F.2d at 1164; *Badoni v. Higginson*, 638 F.2d

172, 176 (10th Cir. 1980); and *Wilson v. Block*, 708 F.2d at 744 n.5. As the court said in *Wilson*:

"[W]e decline to follow those cases . . . which have held, apparently, that the Free Exercise Clause can never supersede the government's ownership rights and duties of public management. . . . This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis." *Id.*

Unlike every other circuit that has examined the issue, the Ninth Circuit here has totally ignored the effect of the lack of a property interest in the "high country." In the present case, the lack of a property interest held by the respondents should be considered in deciding whether the government can be compelled to subjugate other legitimate uses of the national forest to Indian religious practices. The road will not introduce new uses into property owned by respondents; it will only allow for the continuation of multiple use of federal lands in accordance with the Multiple Use and Sustained Yield Act. Because the road will not affect any use of private property and will not introduce significant different uses into the public land near the high country, respondents have not shown that the Indian religious practices have been significantly burdened.

Finally, in *Wilson v. Block*, *supra*, the court held "the First Amendment requires, at a minimum, proof that the religious practice could not be performed at any site other than that to be developed." *Wilson v. Block*, 708 F.2d at 744 n.5. Using this test, it is clear that respondents have once again failed to satisfy their burden. Indeed the sites crucial to the religious practices here will not be developed,

but together will be set aside and protected with a buffer zone. And no showing was made that no other land is available for religious practices. Thus, the road opponents have made no cognizable claim that their free exercise rights have been burdened.

**B. The Ninth Circuit Improperly  
Balanced the Compelling Government  
Interests for Road Construction Against  
the Need to Establish Religious Sanctuary**

In this case there is more at stake than the protection of a few sacred sites from development. Rather, in the Ninth Circuit's words, the "*entire region*" is "sacred" and must be set aside. *Northwest Indian Cemetery Protective Association*, 795 F.2d at 690 (emphasis added). This unprecedented judicial action to establish a religious sanctuary is at complete odds with the records and analyses of the other circuits of infringement of religious cases.

In every other recent case involving similar conflicts between the need for the government not to interfere with traditional religious practices and the proscription against governmental involvement in religious affairs the courts have not seen fit to turn public lands into exclusive religious preserves. In *Badoni v. Higginson*, 638 F.2d 172, the federal government was asked to lower the level of Lake Powell because the lake had inundated the sacred site of certain Navajo religious ceremonies near Rainbow Bridge. In addition, the park service was requested to restrict tourist access to the site and to regulate the conduct of visitors in order to prevent them from behaving disrespectfully at the holy place. The court decided first that the religious practices of the Navajos were not so impaired

as to require the lowering of the level of Lake Powell. The court also stated that the requested visitor regulation by the park service would be "a clear violation of the Establishment Clause." *Id.* at 179. Clearly, governmental interests overrode the allegations of infringement and dangers of establishment.

While in the present case no requests have yet been made for the restriction of public access, the Forest Service has been enjoined to act in a manner that will, for all practical purposes, restrict the access of the public to the Blue Creek Unit of the Six Rivers National Forest.

Similarly, in *Crow v. Gullett*, 541 F. Supp. 785, the State of South Dakota was asked to stop all development in Bear Butte State Park because it interfered with Indian religious practices. The District Court did not reach the constitutionality of this state accommodation but did give clear warning that the state was treading on dangerous ground and "risks being hauled into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become 'excessively entangled' with religion, in violation of the Establishment Clause." *Id.* at 794. Again, without reaching the establishment issue, it is plain that caution must be exercised before mandating drastic remedies designed to avoid an infringement on access to an unfettered use of an area central to religious practices.

Finally, in *Hopi Indian Tribe v. Block*, No. 81-0481 (D.D.C. June 15, 1981) (unpublished memorandum opinion), reported in part in 8 Indian L. Rep. 3073 (1981), *aff'd on other grounds sub nom.* in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956



(1983), the Forest Service was asked to remove existing ski facilities from the Snow Bowl Ski Area, or at least prohibit any expansion of the area, on the grounds that the ski area burdened the practice of the traditional Navajo and Hopi religious ceremonies. *Id.* at 739. The District Court decided first that there was no unconstitutional infringement upon the practice of the Indian religion. In addition, the court held that to remove or disallow the expansion of the ski facilities would restrict public access to the mountain, an unjustified use of the First Amendment which is also in violation of the Establishment Clause. *Hopi Indian Tribe*, 8 Indian L. Rep. at 3073-76. See *Wilson v. Block*, 708 F.2d at 747.<sup>3</sup>

It is thus apparent that there exists a clear line of authority inconsistent with the Ninth Circuit's ruling. That line of authority clearly demonstrates that government may not take action which restricts or denies public access to public land when that denial aids religious practices to the point that the government is involved in the establishment of religion. The Forest Service thus may not be enjoined from building the G-O Road.

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<sup>3</sup> This reasoning was followed by the District Court of Alaska in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), where the court refused to extend Inupiat sovereignty over 65 miles of the Arctic Ocean, saying the "First Amendment may not be asserted to deprive the public of its normal use of an area." *Id.* at 189.

## CONCLUSION

For all practical purposes the District Court and the Ninth Circuit have made a gift of public lands to respondents for strictly religious purposes. If this precedent is allowed to stand, there could well be no end to the struggle for the dedication of other public lands to one religious purpose or another. When the state goes beyond the mere incidental accommodation of religious practices and actually gives massive land subsidies or other aid to a particular religion, then it has strayed dangerously beyond the limits of religious neutrality enunciated by this Court. This Court should reverse the decision of the Ninth Circuit.

DATED: July, 1987.

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**AMICUS CURIAE**

**BRIEF**

Supreme Court, U.S.  
FILED

JUL 18 1987

JOSEPH F. SPANIOL, JR.  
CLERK

No. 86-1013

In The  
Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD E. LYNG, SECRETARY OF  
AGRICULTURE, et al.,

Appellants,

vs.

NORTHWEST INDIAN CEMETERY PROTECTIVE  
ASSOCIATION, et al.,

Appellees.

On Appeal From the United States Court  
of Appeals for the Ninth Circuit

BRIEF OF THE CITY OF WILLIAMS, ARIZONA  
AS AMICUS CURIAE IN SUPPORT OF  
THE APPELLANTS

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BRIEF OF THE CITY OF WILLIAMS, ARIZONA  
AS AMICUS CURIAE IN SUPPORT OF  
THE APPELLANTS

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CONSENT TO FILING

The City of Williams is a political  
subdivision of the State of Arizona, and as  
such, is not required to obtain the consent  
of the parties to file an Amicus Curiae



brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

## I

## INTEREST OF THE AMICUS CURIAE

Amicus Curiae, the City of Williams, a duly incorporated municipality of the State of Arizona, has an interest in this action because it is currently involved in litigation against the Hopi Tribe of Indians and the United States Forest Service involving issues similar to those raised in this case.<sup>1</sup>

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<sup>1</sup> The City of Williams believes it is imperative to stress that the issues raised in its litigation and the issues raised in this appeal are similar, but not identical. The litigation between the City of Williams and the Hopi Tribe of Indians involves an administrative appeal from a Forest Service decision to develop a ski resort on Bill Williams Mountain, a site used by the Bear Clan of the Hopi Tribe to perform religious ceremonies. The administrative decision which the City of Williams is involved in distinguished the Hopi Indian Tribe's Free Exercise Clause claim from the decision rendered by the Ninth Circuit Court of Appeals in this action. The Hopi Tribe, unlike the Appellees herein, failed to establish, as a factual matter, that

The City of Williams intervened in an administrative appeal filed by the Hopi Tribe of Indians on July 18, 1985. The Hopis had appealed from a United States Forest Service decision permitting the development of a ski resort on 600 acres of Bill Williams Mountain, a geographical area in northern Arizona consisting of approximately 13,000 acres of land. Among other

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the proposed ski resort development unduly interferes with traditional religious beliefs or practices. The administrative decision further concluded that the traditional Hopis' religious practices could coexist with the ski resort development. As such, the administrative decision followed the reasoning and analysis of law articulated by Wilson v. Block, 8 I.L.R. 3076, aff'd 708 F.2d 735 (D.C. Cir. 1983), cert. denied 464 U.S. 956 (1983), which the Ninth Circuit Court of Appeals expressly distinguished in Northwest Indian Cemetery Protective Assoc. v. Peterson, 795 F.2d 688 (9th Cir. 1986) at 692 n. 4 and Northwest Indian Cemetery Protective Assoc. v. Peterson, 764 F.2d 581 (9th Cir. 1985) at 586 n. 3: "This finding distinguishes this case from Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), where tribal Free Exercise objections to development of the San Francisco Peaks in Arizona were rejected because the plaintiffs failed to show that the development would burden them in their religious beliefs or practices." Id.

things, the Hopi Tribe's appeal was predicated upon the Free Exercise Clause of the First Amendment of the Constitution of the United States, a position similar to that taken by the Appellees in this appeal. The City of Williams has a strong economic interest in the development of the ski resort and intervened in support of the decision of the United States Forest Service to allow the development.

The United States Forest Service, as a direct result of the United States Court of Appeals for the Ninth Circuit's decision in this case, issued an indefinite stay of the Hopi Tribe's administrative appeal on September 5, 1985, and the stay remained in effect until January 30, 1986. This stay prevented the development of the ski resort. The stay was lifted as a result of the City of Williams filing a suit in the nature of mandamus in the United States District Court

for the District of Columbia compelling the United States Forest Service to process the administrative appeal in accordance with its own regulations. City of Williams v. Max R. Peterson, No. 85-4102 (D.C. D.C. Dec. 31, 1985).

A decision was finally rendered by the United States Forest Service on April 1, 1987, upholding the Regional Forester's decision to permit the development of the ski resort on the one hand, yet mandating measures of mitigation in deference to and in promotion of traditional Hopi Indian practices and beliefs. The Forest Service's mitigation measures called for the lowering of the upper 300 feet of the ski permit area which, from a design and construction viewpoint, is of extreme importance for the optimal recreational use of the area as a ski resort and, in turn, the optimal use of the public lands.

As a result of the Forest Service's mitigation measures, the City of Williams filed an appeal from the administrative decision on May 13, 1987, in the United States District Court for the District of Columbia. City of Williams v. F. Dale Robertson, No. 87-1291 (D.C. D.C. May 13, 1987). The City of Williams' claim, as pertinent, is that the actions taken by the United States Forest Service to mitigate impacts on traditional Hopi religious practices, constitute a violation of the Establishment Clause of the First Amendment of the United States Constitution - one of the same issues raised by the Appellants in this action. As a result, the resolution of the issues raised before this Court on appeal may very well be dispositive of the issues raised by the parties in the litigation concerning the development of Bill Williams Mountain.

## II

## SUMMARY OF ARGUMENT

The Ninth Circuit erred in its decision below by not applying the recognized judicial test for evaluating Establishment Clause claims. Governmental action, under the Establishment Clause, prohibits governmental activity which does not have a secular purpose, or activity with a primary effect of advancing religion or activity which results in excessive governmental entanglement with religion.

Application of this test to the facts of this case requires a finding that the injunction issued by the District Court below causes governmental action in violation of the Establishment Clause.



## III

## ARGUMENT

## A.

THE NINTH CIRCUIT COMMITTED REVERSIBLE  
ERROR BY NOT APPLYING THE "SECULAR  
PURPOSE" AND "PRIMARY EFFECT" TESTS OF  
LEMON V. KURTZMAN TO THE FOREST  
SERVICE'S ESTABLISHMENT CLAUSE CLAIM

1. Under Lemon v. Kurtzman, Governmental Action Violates the Establishment Clause of the First Amendment IF the Action Does Not Have a Secular Purpose, or IF the Principal or Primary Effect of the Action Advances or Inhibits Religion, or IF the Action Results in Excessive Government Entanglement with Religion.

The United States Forest Service argued in the Ninth Circuit Court of Appeals that the action mandated by the District Court for the District of California would result in the establishment of a religious preserve for the benefit of the tribal Appellees in this case in violation of the Establishment Clause of the First Amendment of the Constitution of the United States. The

Ninth Circuit, without support of authority, concluded that the tests enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612-613, (1971) should not be literally applied in cases involving a Free Exercise claim. Northwest Indian Cemetery Protective Assoc. v. Peterson, 795 F.2d 688, 694 (9th Cir. 1986). This Court, however, has just recently embraced and reaffirmed the Lemon decision, and applied the tests set forth therein in Edwards v. Aguillard, 55 U.S. L.W. 4860 (U.S. Sup.Ct. No. 85-1513, June 19, 1987).

In Edwards, the Supreme Court recently ruled as follows:

The Establishment Clause forbids the enactment of any law "respecting an establishment of religion." The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). State action violates the Estab-

lishment Clause if it fails to satisfy any of these prongs.

Edwards, at 4861 (Footnote omitted). While the test established by Lemon, and followed by Edwards, relates specifically to legislative action, there is no rational discernible basis for not applying the test to governmental action mandated or prohibited by the judicial or executive branches of government as well.

The Supreme Court made it perfectly clear that the Lemon test, in all but unusual circumstances, is the test to be applied when a court examines a First Amendment Establishment Clause claim. It stated:

The Lemon test has been applied in all cases since its adoption in 1971, except in Marsh v. Chambers, 463 U.S. 783 (1983), where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause.

Edwards, at 4861, n. 4 (emphasis added).

In light of Lemon's firmly established

principles, it is somewhat difficult to understand the Ninth Circuit's cavalier disregard for the Lemon test when evaluating the United States Forest Service's Establishment Clause claim.

As justification for disregarding the Forest Service's Establishment Clause claim, the court below relied upon Wisconsin v. Yoder, 406 U.S. 205 (1962); Sherbert v. Venner, 374 U.S. 398 (1963); and Zorach v. Clauson, 343 U.S. 306 (1952). See, Northwest Cemetery, 795 F.2d at 694. These cases provide little support for the Ninth Circuit's failure to adequately address the Forest Service's Establishment Clause claim. The factual circumstances in this case, where the government, in effect, is being required to establish a religious preserve for traditional Native American religious practices, bear little resemblance to the factual circumstances set forth in the Yoder, Sher-

bert, and Zorach decisions.

In Yoder, the Supreme Court held that the State of Wisconsin could not force Amish children to attend a formal high school to the age of 16. The Supreme Court, in effect, granted the Amish children an exemption from the State of Wisconsin's compulsory school attendance law based upon the Free Exercise Clause of the First Amendment. Unlike the case at hand, the issue before the court in Yoder, did not involve governmental action which sponsored or promoted a particular religious belief or practice. Yoder, at 234, n. 22. Indeed, the statute challenged in Yoder did have a secular purpose, the education of children who resided in the State of Wisconsin. Similarly, there was no evidence that the effect of the exemption from the compulsory school attendance law advanced or inhibited Amish religious beliefs. Rather, the

exemption from the law was regarded as an accommodation, an expression of neutrality. Id. The Supreme Court stated that, "[t]he purpose and effect of such an exemption are not to support, favor, advance or assist the Amish . . . ." Similarly, no excessive governmental entanglement with Amish religious practices would result if the exemption from Wisconsin's compulsory school attendance law were granted. Thus, contrary to the Ninth Circuit's decision herein, Yoder does not permit a court to disregard the test for Establishment Clause claims set forth in Lemon, merely because a party has raised a claim based upon the Free Exercise Clause of the First Amendment. Rather, the Yoder decision to exempt Amish children from the compulsory school attendance law of Wisconsin meets the criteria set forth in Lemon.

The Ninth Circuit's reliance on



Sherbert is also misplaced. In Sherbert, the Supreme Court held that a South Carolina unemployment benefit statute as applied by the State of South Carolina violated the Free Exercise Clause of the First Amendment because it disqualified a Seventh Day Adventist from unemployment benefits for refusing to work on a Saturday.

In addressing the Establishment Clause concerns raised in Sherbert, the Supreme Court reasoned that it was only following a "governmental obligation of neutrality in the face of religious differences, and [the holding] does not represent that involvement of religious with secular institutions, which it is the object of the Establishment Clause to forestall." Sherbert, at 409. Thus, the court, while not expressly utilizing the test set forth in Lemon, recognized that its holding did not have a primary purpose or effect of promoting the

Seventh Day Adventist religion, nor did the decision require excessive governmental entanglement with that religion, the second and third Establishment Clause tests set forth in Lemon.<sup>2</sup>

In Zorach, the Supreme Court upheld a New York State statute which permitted children to be released time from public instruction to attend religious classes located outside of the public schools. In

---

<sup>2</sup> Prior to the Supreme Court decision in Lemon, case law interpreting the Establishment Clause used and discussed the applicability of any one of the criteria set forth in the Lemon test to resolve Establishment Clause challenges. The Lemon decision represented a synthesis of prior Establishment Clause case law before the Supreme Court. This synthesis of prior case law is evident by the Supreme Court's statement that "[e]very analysis in this [establishment clause] area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases." Lemon, 403 U.S. at 612. As a consequence, cases decided prior to Lemon tend to focus on one of the criteria set forth in Lemon as opposed to all three. Since the Lemon decision, however, Establishment Clause claims have been evaluated by each of the criteria set forth in Lemon.

Zorach, the force of the public school system was not used to promote religious instruction. Rather, the public schools merely adjusted their schedules to accommodate the religious needs of the people. While Zorach may permit governmental accommodation to a religious practice, in no way does it mandate governmental action to force such an accommodation, as the lower courts have done in this case. Nor does the decision hold that governmental action so mandated does not violate the Establishment Clause of the First Amendment. In any event, Zorach was decided long before Lemon, and serves as weak authority for the proposition that the three criteria set forth in the Lemon test need not be "too literally" applied as suggested by the Ninth Circuit Court of Appeals. See, Northwest Indian Cemetery, at 795 F.2d 694.

An analysis of the authority relied upon by the Ninth Circuit Court of Appeals below in support of its conclusion that the test for Establishment Clause claims set forth in Lemon need not be literally adhered to is not well taken. In each case cited as support by the Ninth Circuit for this proposition, the court found that the governmental action taken was neutral - that no religious belief or practice was being fostered by the governmental actions in question. None of those cases state that the assertion of a Free Exercise claim somehow does away with the First Amendment's prohibition respecting an establishment of religion.

2. The Injunction Issued By the Court Below Fails All Three Tests Established by Lemon v. Kurtzman.

- a. The Injunction Does Not Have Secular Purpose.

The injunction issued by the United States District Court for the District of California, among other things, ordered:

IT IS HEREBY ORDERED that defendants are permanently enjoined from constructing the Chimney Rock Section of the G-0 road and/or any alternative route for that Section which would traverse the high country . . . .

Northwest Indian Cemetery Protective Assoc. v. Peterson, 565 F. Supp. 586, 606 (D.C. N.D. Cal. 1983).

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J. Concurring).

The injunction was entered by the District Court below on the basis that the "implementation of the Management Plan would seriously impair the Indian's use of the high country for 'religious practices' . . . ." Northwest Indian Cemetery, 565 F. Supp. at 594.

The purpose of the injunction could not be clearer. The injunction does endorse a particular religious belief and practice by requiring the United States Forest Service to manage federal lands for the purpose of protecting the Indian's beliefs and practices. It cannot be persuasively argued that this protection does not advance the beliefs and practices of the traditional Indian religious practitioners. In essence, the injunction requires the Forest Service to create a preserve for the Indian's beliefs and practices on federally owned lands to the exclusion of almost all other secular uses.

While the courts below justify the injunction preventing construction of a road in the high country on the basis that the injunction merely serves as an accommodation to traditional Indian religious beliefs and practices, such a justification does not bear



scrutiny. The District Court concluded that the "Forest Service failed to accommodate the Indian plaintiff's religious practices to the extent required by the Free Exercise Clause." Id. at 597 (emphasis added). The Free Exercise Clause, however, does not "require" governmental action. Rather, it is prohibitory in nature. It is designed to stop governmental action which conditions benefits or penalizes actions as a result of a person's belief or practice. Any governmental action, whether judicial, legislative, or executive in nature, which "requires" accommodations to religious beliefs is forcing the government to behave in a manner which fosters or benefits religious practices.

Contrary to the District Court's assertions, the record below does indicate that the Forest Service did attempt to accommodate the religious practices of the

Indians to the extent that Indian religious uses did not infringe upon or dictate governmental action for other uses of the public land. A report was prepared for the Forest Service which identified specific ritualistic sites used by the Indian religious practitioners. As a result of the site locations, the Forest Service chose a location for the Chimney Rock section of the G-O Road which was furthest removed from those sites. This action was taken as an accommodation to the religious beliefs and practices of the traditional Indian religious practitioners. Yet, the action still maintained a predominantly secular purpose by recognizing the need of the local communities to be served by the road as well.

The courts below, however, ignored the secular purpose behind the Forest Service's decision and ruled that the relocation of the

road was not enough. The court ordered that the government must actually make decisions which favor the ongoing religious practices of these Indian Appellees to the exclusion of other secular uses. Such a requirement goes beyond accommodation - it constitutes a restriction on the secular uses of public lands for the sole benefit of a few Indian religious practitioners. Such a restriction was motivated solely for purposes of the Indian's religious beliefs and therefore runs afoul of the Establishment Clause.

b. The Primary Effect of the Injunction Advances the Indian's Religious Beliefs and Practices.

The effect of the injunction is to set aside public lands to advance and protect the religious practices of the Indian Appellees. The court below skirts this issue by reasoning that the public lands are still open to recreational uses. This reasoning, however, is not totally accurate.

Recreational use will be limited to those few users who have the physical wherewithal to pack into the high country. Day users and recreational users who, because of physical limitations, must use an automobile, will be denied access to the high country as a result of the lower court's injunction prohibiting construction of the road. Hence, the primary effect of the injunction is to advance the religious beliefs and practices of the Indians. Little room is left for secular uses of the high country under the lower court's decision.

c. The Injunction Creates Excessive Entanglement Between Government and Religion.

As a result of the lower court's decision, the United States Forest Service is being forced to manage federal lands for the benefit of a few traditional Indian religious practitioners.

The lower court's decision not only affects the construction of a road over public lands located in Northern California, but has had a direct impact on the ability of the Forest Service's administration of public lands in Arizona and other States as well. As a result of the decision, endless hours have been spent by government employees in an effort to mitigate any impacts their decisions may have on traditional Indian religious beliefs. It is safe to say that Indian concerns predominate in the environmental impact statement prepared by the Forest Service in this action, as well as others. The Forest Service has, as a practical matter, been forced into indecision on matters of great public import over the use and management of federal lands as a result of the decision entered below. Certainly, this stifling stagnation and over-preoccupation with these

concerns constitutes excessive governmental entanglement with the religious practices of the Indians.

For instance, as a direct result of traditional religious practices, the Forest Service has delayed its decision to permit a ski resort on Bill Williams Mountain in Arizona for more than three years. Other than the Hopis' religious concerns, no objection has been made by anyone to the proposed development of the ski resort. As a result of the Hopis' religious concerns, Forest Service personnel have had to dedicate hundreds of hours of their time to attempt to accommodate those concerns. Such entanglements violate the Establishment Clause.

#### IV

#### CONCLUSION

Like the residents located near the "high country" in this case, the permitting



of a ski resort on federal land located near the City of Williams will have a dramatic positive economic impact on the City of Williams and its citizens. The City of Williams, like many small communities located throughout the United States, is a small community struggling to maintain its existence. The City owes its creation to the railroads and migration West by millions of people along the famed Route 66.

Now, however, railroad travel is all but non-existent and today a freeway by-passes the City. As a result of these changes, the City of Williams has had to redirect its economic endeavors to tourism and recreation. The children who grow up and desire to stay in the City of Williams can no longer do so due to the fact that there are no employment opportunities available. The citizens of the City of Williams view the development of a ski

resort as a new future for themselves and their children. The religious claims made by the Hopi Tribe, like the claims made by Indians in this appeal, pose a serious risk not only to the development of a ski resort, but the dreams and hopes of the people as well.

It is estimated that the Bill Williams Mountain ski resort will provide 117,000 skier visits per year with gross revenues derived from the resort totalling approximately \$2,340,000 per year. This amount, however, does not include the revenues spent on support services, such as food and lodging, provided by neighboring communities.

It is estimated that this economic infusion of revenue into the City will produce hundreds of jobs to the local residents.

Hopi Indian claims to thwart the ski

resort development are based upon a small group of religious practitioners who only practice their religious rites twice a year at the very top of the Bill Williams Mountain. The mountain, consisting of almost 13,000 acres of land, of which only 600 acres would be permitted for the ski resort activity, is thus said to be dedicated for all time to religious claims by this small group of practitioners in a way that would prevent any economic use of the totality of the mountain. Any reasonable balancing of the interests of the Indian practitioners of their religion strongly militates against the dedication of the totality of the mountain, as against the necessity of economic survival of a community that has little or no other resources to maintain itself.

Many traditional Indian religions view all lands as sacred. If the decision of the

Ninth Circuit below is allowed to stand, we may find that vast areas of our public lands will no longer be available for public uses.

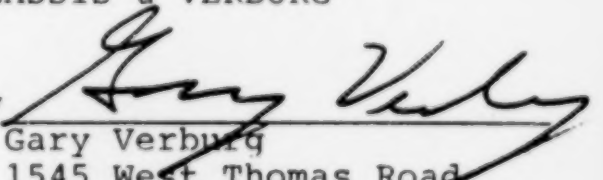
Clearly, such a position does not comport with Congress' statutory mandate that federal lands be made available for multiple uses. If multiple uses are to be restricted for purposes of deferring to the religious practices of anyone, then such restrictions run afoul of the Establishment Clause of the First Amendment.

For the foregoing reasons, the Ninth Circuit's opinion below should be reversed.

Respectfully submitted this 18th day of July, 1987.

VCLASSIS & VERBURG

By

  
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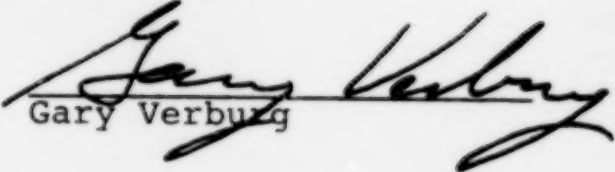
## CERTIFICATE OF SERVICE AND FILING

I, Gary Verburg, being first duly sworn, depose and state that on or before July 18, 1987, I caused to be mailed an original and forty copies of the foregoing Amicus Curiae Brief of the City of Williams, by depositing the same in a United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk of this Court and served three copies of said brief upon counsel of record for the Appellants and Appellees by depositing said copies with the United States Post Office with first-class postage prepaid to the following addresses:

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18th day of July, 1987, by Gary Verburg.

  
Notary Public

My Commission Expires:

August 15, 1990



**AMICUS CURIAE**

**BRIEF**

(9)  
No. 86-1013

Supreme Court, U.S.  
**FILED**

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CLERK

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

**OCTOBER TERM, 1986**

**RICHARD E. LYNG,**  
**SECRETARY OF AGRICULTURE, et al.,**

*Petitioners,*

v.

**NORTHWEST INDIAN CEMETERY PROTECTIVE**  
**ASSOCIATION, et al.,**

*Respondents.*

**ON WRIT OF CERTIORARI FROM THE UNITED**  
**STATES COURT OF APPEALS FOR THE**  
**NINTH CIRCUIT**

**BRIEF OF THE STATES OF HAWAII, SOUTH**  
**DAKOTA, UTAH, AND WASHINGTON AS**  
**AMICI CURIAE IN SUPPORT OF**  
**PETITIONERS**

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## **QUESTION PRESENTED**

Whether the First Amendment free exercise clause requires the government to accommodate religious uses of public land that conflict with public land management programs.

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STATEMENT OF INTEREST OF  
AMICI CURIAE

The states submitting this brief support the United States Forest Service in this case. Like the Forest Service, each state manages substantial holdings of public land for

a variety of public purposes. Like Forest Service programs, state land management programs may conflict with Native American religious uses of state lands.<sup>1</sup>

While Native American religious claims are presented here, the relief requested is based upon the First Amendment free exercise clause, not a federal statute or treaty. The decision thus applies to any person who can make a bona fide religious claim to control the use of public land. The decision goes well beyond the opportunity to express religious views on public property or to be permitted access to such property. It in effect transfers the power to determine management policy from the government to the individual who makes the free exercise claim.

Public land managed by the states may be divided into three categories. The first category is trust land which Congress granted at Statehood. The federal land grants constitute an express trust with the United States as grantor, the state as trustee, and designated public institutions (e.g., common schools, universities) as beneficiaries. These trusts create a permanent endowment to generate income for the beneficiary institutions.<sup>2</sup>

State trustees generate income from this endowment in two ways: (1) by selling the land, investing the principal,

<sup>1</sup>In Washington, for example, twenty-five federally recognized tribes reside on twenty-four reservations. Jones, *Analysis of Indian Affairs: Background, Nature, History, Current Issues, Future Trends* (Congressional Research Service, Report No. 84-55, April 2, 1984). Native Americans in Washington are actively asserting First Amendment religious rights which conflict with management objectives on State lands. Similar conflicts are occurring in other states. See e.g., *Dedman v. Board of Land and Natural Resources*, Nos. 11126 and 11134 (HAW. July 14, 1987).

<sup>2</sup>E.g., Washington State Enabling Act §10, 25 Stat. 676 (1889). See also *Alamo Land & Cattle v. Arizona*, 424 U.S. 295 (1976); *Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. United States*, 251 U.S. 41 (1919); *County of Skamania v. Washington*, 102 Wn.2d 127, 685 P.2d 576 (1984); *Oklahoma Education Association v. Nigh*, 642 P.2d 230 (Okla. 1982); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981).

and distributing the income to the beneficiaries, or (2) by retaining ownership and managing the lands to maximize income to the beneficiaries.<sup>3</sup>

These trust lands may not be put to a general state purpose, but are dedicated by federal law to the exclusive financial support of the beneficiaries. Attempts to use trust lands for non-income purposes such as a public highway or park have been invalidated as breaches of the trust.<sup>4</sup>

The second category is aquatic land. All fifty states acquired the beds and shores of navigable waters at Statehood.<sup>5</sup> States manage aquatic lands for navigational, commercial, environmental, and recreational uses. Under the public trust doctrine, states manage such lands for the use and benefit of all citizens.<sup>6</sup>

The third category is nontrust public land dedicated primarily for particular conservation values. This category includes land dedicated for park, scenic, conservation, game, or wilderness uses.

In all three categories, religious practices may be compatible with some public land uses and incompatible with others. For example, a religious use that required a wilderness setting might be compatible with a conservation use of nontrust land, but would directly and irreconcilably

<sup>3</sup>Washington, for example, manages over 3 million acres of trust land and returned \$139 million dollars in fiscal year 1986 to trust beneficiaries, primarily common schools. Fiscal Year 1986 Fiscal Report, Washington State Department of Natural Resources at 38.

<sup>4</sup>*Lassen v. Arizona*, 385 U.S. at 468; *State v. University of Alaska*, 624 P.2d at 811. States may use general fund monies to purchase land from the trust and then dedicate the land to a general state purpose if the trust is fully compensated. *Ibid.*

<sup>5</sup>*Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

<sup>6</sup>*Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987).

conflict with the State's federally mandated duty to maximize income from trust land for trust beneficiaries.

Under the Ninth Circuit's decision, the religious use will prevail over incompatible public land management policies. Expanding the free exercise clause to limit public land uses incompatible with religious uses actually creates a religious servitude on the land.

This brief is prompted by the lower court's imposition of the free exercise clause upon public land management. Each state is substantially affected by an application of the free exercise clause that would allow individuals to take property rights from government in the form of a religious servitude. While free exercise rights ought to be accommodated where compatible with the governmental and public use of the land, the First Amendment does not go so far as to allow one religious group to dictate the management policies for public land held for the benefit of all citizens.

### SUMMARY OF ARGUMENT

Prior free exercise cases involve government compulsion of religiously offensive conduct. The remedy sought is an exemption from the government requirement. These cases have required the government to demonstrate a compelling interest before it may burden the free exercise of religion.

This case is fundamentally different. The government action here involves land management, not compelled conduct. The remedy afforded the respondents by the lower courts is a complete bar to the government program, not an exemption that permits the government program to continue.

This case is more analogous to the public forum cases where the Court has balanced First Amendment free speech rights with government's interest in managing public property. As in the public forum cases, this Court should only require government to accommodate First Amendment rights to the extent compatible with the nor-

mal uses of public property. This compatibility test respects the preexisting property, governmental, and public interests, and accommodates free exercise liberties.

If, instead of the approach suggested above, the Court adopts the approach utilized by the Ninth Circuit, it should nevertheless reverse the decision below for inadequately weighing the government's interest in determining its own land management policies.

### ARGUMENT

#### I. THE FREE EXERCISE CLAUSE REQUIRES PUBLIC LAND MANAGEMENT TO ACCOMMODATE RELIGIOUS EXERCISE RIGHTS ONLY WHEN COMPATIBLE WITH PUBLIC USE

##### A. The Free Exercise Clause Provides a Shield Against Government Compulsion of Conduct Contrary to Religion.

The free exercise clause provides a remedy against government action which compels conduct contrary to an individual's religious belief. The free exercise remedy takes the form of an exemption from the governmental requirement.

The free exercise clause is implicated when the government compels conduct contrary to religious belief by a direct requirement, such as a military regulation which forbids wearing religious headgear,<sup>7</sup> a statute which compels payment of a social security tax contrary to religious belief,<sup>8</sup> or a criminal penalty which compels compulsory education contrary to religious belief.<sup>9</sup>

The free exercise clause is also implicated when the government conditions receipt of an important benefit (e.g., unemployment benefits) upon conduct proscribed by

<sup>7</sup>*Goldman v. Weinberger*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 1310 (1986).

<sup>8</sup>*United States v. Lee*, 455 U.S. 252 (1982).

<sup>9</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).



a religious faith (e.g., working on Saturday), or denies such a benefit because of conduct mandated by religious belief, thereby forcing a choice between the benefit and the religiously offensive conduct.<sup>10</sup>

Thus, one significant characteristic of a free exercise claim is that government action is directed outward at individual conduct. This is true whether the government attempts to compel individual conduct contrary to religion directly by requirement or prohibition, or indirectly by requiring a choice between a benefit and religiously offensive conduct.

A second significant characteristic of a valid free exercise claim is that the government program survives the claim. Because the objectionable government action involves a requirement or prohibition of general application directed outward at individual conduct, relief takes the form of an exemption from the general rule. The objection in a free exercise case is not to government action as generally applied but in its application to the individual. Thus, even when the free exercise claim is successful, it does not defeat the government program.

The free exercise clause, in short, has only been available as a shield to protect against government compulsion of conduct contrary to religion. While the individual has been shielded, the government program has survived the free exercise accommodation.

These two distinguishing characteristics of a valid free exercise claim are absent here. First, the government action is not directed at individual conduct but relates to the management and use of public land. Second, respondents cannot obtain the relief they seek by shielding themselves with an exemption. Instead, they use the free exercise clause as a sword to strike down in its entirety the offending government action.

<sup>10</sup>*Hobbie v. Unemployment Appeals Comm. of Florida*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 1046 (1987); *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

## B. Respondents May Not Use the Free Exercise Clause to Dictate Public Land Policy.

The free exercise clause is not a sword with which respondents may dictate government conduct. Justice Douglas described the limited, defensive nature of the free exercise clause:

[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.<sup>11</sup>

Justice Douglas also explained:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.<sup>12</sup>

A remedy such as respondents seek severely limits the government's ability to manage public land on behalf of the general public. Moreover, in a state land case, such a remedy could interfere with the fulfillment of fiduciary responsibilities emanating from federal law. This remedy may satisfy respondents, but it extracts more than a simple exemption from the application of a law. By striking down the proposed land use, the respondents burden the public land with a religious servitude in their favor.

Justice O'Connor's description of the free exercise accommodation right illustrates the difference in respondents' remedy from prior cases.

Only an especially important government interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an *equal* share of the rights, benefits, and privileges enjoyed by other citizens.<sup>13</sup>

<sup>11</sup>*Sherbert v. Verner*, 374 U.S. at 412 (concurring opinion).

<sup>12</sup>*Ibid.*

<sup>13</sup>*Bowen v. Roy*, 476 U.S. \_\_\_, 106 S. Ct. 2147, 2167 (1986) (concurring opinion) (emphasis added).

The remedy sought here is more than an "equal share" of rights in public lands. Instead, by preventing chosen government uses, respondents dictate a public program in their favor. Conflicting uses are precluded. Those who would otherwise benefit from conflicting uses lose their share of the public land resource. Respondents' remedy distributes a finite resource in favor of their free exercise but to the harm of the rest of the public.

The nature of respondents' remedy — extracting more than an equal share and preventing conflicting public land management programs — makes it inappropriate to place the burden of showing a compelling interest upon government. Since respondents seek a distribution from government, the government should not have to justify why respondents should not extract a greater than equal share of the public land. Instead, respondents should be required to explain how their rights can be accommodated compatibly with the existing and future use of the public land.

### C. Governmental Management of Public Lands Should Accommodate Free Exercise Claims Only When Compatible With Existing Land Uses.

When government regulation that burdens free exercise is directed at individual conduct and when the relief sought is a narrowly drawn exemption, the government should bear a heavy burden to support unbending application of its regulation to the religious objector. In fact, once it has been shown a governmental regulation burdens the free exercise of religion, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."<sup>14</sup>

When a free exercise claim is asserted with reference to public land, the government should not have to demon-

<sup>14</sup>*Wisconsin v. Yoder*, 406 U.S. at 215. See also *United States v. Lee*, 455 U.S. at 257-8; *Thomas v. Review Board*, 450 U.S. at 718.

strate a compelling interest to justify its program. Instead, the proponent of the religious claim should have the burden of demonstrating both that free exercise rights are impacted *and* that the relief is compatible with the use of the public's property. The government should then accommodate those religious uses compatible with public land management. This approach is supported by precedent and policy.

A test based on compatibility with existing use draws from First Amendment free speech case law. In the public forum cases, this Court has addressed the First Amendment free speech right in public places. When property is open to the public, the government cannot deny the exercise of First Amendment rights if the exercise of those rights is compatible with public use.<sup>15</sup> On the other hand, even when government property is open to the public, the exercise of First Amendment rights may be limited so as to prevent interference with the use to which the property is ordinarily put by the State.<sup>16</sup> In addition, government regulation of free speech is permissible when such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it.<sup>17</sup>

The compatibility test recognizes that religious rights may extend to public property and that the government's property interest alone does not defeat a free exercise claim.<sup>18</sup> Requiring the government to accommodate only those religious claims compatible with public use, however,

<sup>15</sup>See e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-15 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

<sup>16</sup>*Food Employees v. Logan Plaza*, 391 U.S. at 320; *Cameron v. Johnson*, 390 U.S. 611, 616 (1968).

<sup>17</sup>*Food Employees v. Logan Plaza*, 391 U.S. at 320-21; *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

<sup>18</sup>See *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980).



more properly balances the interests of a proponent of a free exercise claim directed at limiting land use rather than guaranteeing equal access.

When the government reaches out to compel religiously offensive behavior, the government must make a strong showing why its interest should prevail over the individual's religious interest. Government land management decisions, however, are made for the benefit of the whole, not individuals. The compatibility test is more consistent with the less personally intrusive nature of the government action in public land management.

The relief sought by a religious objector in free exercise cases has been an exemption from the government requirement. Granting relief has not defeated an entire government program. A government plan to use public land, however, differs from a regulatory program. The religious objector does not seek an exemption from the program; rather the objector stops the program in its tracks and directs its future course. The compatibility test accommodates the religious claim without defeating the entire government program.

If a free exercise claim limits public land use, the religious objector receives a right in the public land greater than that enjoyed by other citizens. A test that protects a religious claim only if compatible with the public use of the land will ensure that religious objectors will receive an equal, but not greater, share of such use rights.

Finally, a compatibility test is more sensitive to the government and the public interest in public land. Under this approach, the government must accommodate a religious use to the extent compatible with the existing land use. To determine compatibility, the nature and use of the land are examined on a case by case basis. A religious claim based on a need for undisturbed wilderness might be compatible with a park or wildlife preserve. It would certainly be incompatible with trust land dedicated to income production for the benefit of federally designated benefi-

ciaries. The nature of the religious claim would also be examined on a case by case basis. A religious claim needing vast acreages of land would likely be less compatible with most public land uses than would a claim centered on a small grove of trees.

In the public forum cases, the Court has acknowledged First Amendment rights with respect to public property by allowing them to the extent compatible with the use to which the property is put by the government and the normal use of the public property by other members of the public. Thus, free speech may not be excluded from public land but neither can a free speech claim change or alter the use to which the land is dedicated. A similar analysis should apply to public land cases involving a free exercise claim.

## **II. THE LOWER COURTS FAILED TO WEIGH ADEQUATELY THE GOVERNMENT INTEREST**

Even if the Court applies the Ninth Circuit's analytical approach to this case, the Court nevertheless should reverse the lower court for failure to weigh adequately the government interest. The government interest in public land management is both compelling and severely impaired by accommodating a religious servitude.

Prior cases establish that to burden a free exercise right the government must demonstrate that it has chosen narrowly tailored means to accomplish an especially important government interest. To analyze the government interest, courts must examine both the government interests in undertaking its program and the impairment to those interests that results from accommodating religion.

### **A. The Government's Interests in Public Land Management are Compelling.**

The Court of Appeals found no government interest in the completion of the paved G-O Road or the logging of



the high country.<sup>19</sup> The court rejected the government's argument that land management itself was compelling and found that such an argument yielded "nothing" to the free exercise claim.<sup>20</sup> The Court of Appeal's summary dismissal of land management as a compelling interest is insensitive to two hundred years of public land management in this country and should be rejected by this Court.

The government wears several hats in managing public land, each of which should be considered. The government has an interest as a property owner.<sup>21</sup> When free exercise accommodation limits use of public land, the government's property interest is diminished.<sup>22</sup>

The government also has an interest as sovereign. The sovereign interest is reflected in the government's political determinations as to how public lands are to be used. Government programs reconcile conflicting uses such as recreation, wildlife habitat, watershed protection, timber production, and grazing, all of which serve the public welfare. Reconciliation of these conflicting uses results in complex, interrelated government programs. When accommodation of a free exercise right completely precludes a road, recreation, or timber use, the government's sovereign interest in its programs is defeated.

Finally, the government has an interest in public land management that reflects the interests of the general public as users. The public's use of a road or the public benefits from resource development or recreation weigh heavily against a conflicting free exercise claim.

<sup>19</sup>*Northwest Indian Cemetery Protection Ass'n v. Peterson*, 795 F.2d 688, 695 (9th Cir. 1986); Pet. at 14a.

<sup>20</sup>*Ibid.*

<sup>21</sup>*Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

<sup>22</sup>If State trust lands are involved, the property interest lost to free exercise accommodation would be the value that subsidizes public education and other public institutions. For example, harvesting timber is an attribute of property ownership. If free exercise accommodation forbade a state from harvesting a site, that valuable property interest would be taken from the state.

The government action here is subject to each of these compelling government interests — the property interest, the sovereign's interest in politically determining public land use, and the use interest of the general public. The Court of Appeals' summary dismissal of the appellants' interests as "not compelling" demonstrates a lack of concern with the important government interests in public land management.

### **B. The Government's Interests are Substantially Impaired by Accommodating Respondents' Religious Use.**

The Court of Appeals also failed to analyze adequately the impairment to the government's interest from accommodating the free exercise claim. Unlike those cases where a free exercise claim has prevailed, the government may not simply exempt a religious objector from application of a land management decision and still maintain the program for the benefit of the general public. Accommodations of the free exercise of a site-specific religious right results in the complete alteration of a generally applicable program. Thus, the impairment to government interests from accommodating free exercise claims on public land is substantially greater than the minor impairment to government interests in prior cases like *Yoder*.<sup>23</sup>

The government therefore has important interests in public land management which are substantially impaired when the free exercise clause is permitted to dictate land use decisions. These government interests were not adequately addressed below.

<sup>23</sup>The government interests in *Yoder* easily survived free exercise accommodation in the form of an individual exemption. However, if the Amish had challenged the entire government program, not specific application, their free exercise interests would not have outweighed Wisconsin's interest in applying its school attendance law to the rest of the state. A challenge to the development or management of public lands similarly attacks a generally applicable government program, not the application of the program to an individual.

### III. CONCLUSION

For the reasons given above, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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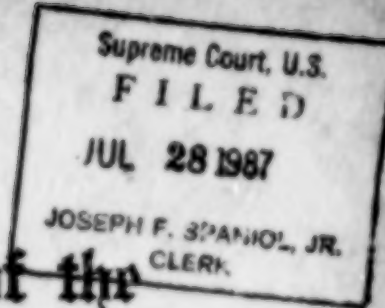
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**AMICUS CURIAE**

**BRIEF**



10  
No. 86-1013



**In the Supreme Court of the  
United States**

October Term, 1986

**RICHARD E. LYG,**  
**SECRETARY OF AGRICULTURE, et. al.,**  
*Appellants,*

v.

**NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, et al.,**  
*Respondents.*

**ON APPEAL FROM  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**BRIEF OF  
COLORADO MINING ASSOCIATION,  
NEVADA MINING ASSOCIATION,  
UTAH MINING ASSOCIATION,  
WYOMING MINING ASSOCIATION,  
AND MONTANA COAL COUNCIL  
AMICI CURIAE  
IN SUPPORT OF THE APPELLANTS**

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Public Policy Program, *Energy From  
the West* (1981) ..... 3In the Supreme Court of the  
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AND MONTANA COAL COUNCIL  
*AMICI CURIAE*  
IN SUPPORT OF THE APPELLANTSINTEREST OF *AMICI CURIAE*<sup>1</sup>This case presents the Court with the opportunity  
to articulate a standard which defines the parameters of<sup>1</sup> Counsel of record to the parties in the case described above have  
consented to the filing of this brief. Letters of consent have been  
filed with the Clerk pursuant to Rule 36.

First Amendment protection for religious beliefs and practices when those beliefs and practices conflict with the use of public lands and resources. The decision of the lower court raises issues of paramount importance to those involved in the production of natural resources and to the millions of individuals who use public lands for recreational and economic purposes.

The Colorado, Nevada, Utah and Wyoming Mining Associations, and the Montana Coal Council represent private individuals and corporations involved in the exploration and production of minerals in the western United States. The bulk of this activity takes place on mining claims and leases on federal and state lands. The United States Department of Energy has estimated that federal lands contain 85% of the nation's crude oil, 40% of the natural gas, 40% of the uranium, and 35% of the coal reserves. U.S. Dept. of Energy, *Securing America's Future Energy: The National Energy Policy Plan* 1 (1981). In the western United States, as much as 60% of the known coal reserves are owned by the federal government. Council on Environmental Quality, *Environmental Quality* 351 (1986). The decision of the lower court, which represents a unique application of the Free Exercise Clause, severely restricts government control over the use of public land and resources. If this decision is affirmed, mineral exploration and development on public lands may be significantly impaired.

The potential impact of the lower court's decision flows directly from the unique nature of Indian religion. Indian religion is usually inseparable from the culture

and tradition of the specific tribe, and it often focuses on large geographical areas. J. Hurdy, *American Indian Religions* 13 (1970). The earth, or a geographic feature, is often regarded as a living thing or deity, upon which the existence of all other things may depend. See *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983) (Hopis regard San Francisco Peaks of Coconino National Forest as living deity).

Problems arise when the government seeks to develop public lands by road construction, mining, timber production, or oil and gas production, which is often seen by Indians as inconsistent with their religious practices and beliefs. Indians often claim that when public land use and Indian religious beliefs or practices conflict, their religious tenets may generally be satisfied only by the preservation of these lands in a pristine state, i.e., as a sanctuary to facilitate religious practices or protect religious beliefs.

Further complicating the problem is the fact that Indian religions tend to be undocumented. Consequently, it is impossible to predict exactly where resource development and religious claims will conflict. Nevertheless, it is clear that conflicts are inevitable. Most of the public lands, and therefore most of the public resources, are concentrated in the thirteen western states and Alaska.<sup>2</sup> Coincidentally, Indian tribes and lands are now concentrated in the same region. See University of Oklahoma

<sup>2</sup> Of the 732 million acres owned by the United States, over 566 million lie within the geographical boundaries of the Ninth Circuit. See U.S. Dept. of the Interior, Bureau of Land Management, *Public Land Statistics* 10 (1984).

Science and Public Policy Program, *Energy From the West* 4, 13 (1981). Indeed, Indian aboriginal lands may be characterized as coextensive with the western United States. Affirming the ruling of the lower court will provide Indian tribes and their individual members with significant influence, without support in the Constitution, over the use of public lands and resources whenever such use is alleged to be inconsistent with their religious beliefs or practices.

This concern is not fanciful or hypothetical. The decision of the lower court has already spawned many similar cases. Two examples from among this progeny are illustrative. Energy Fuels Nuclear, Inc., a member of the Utah Mining Association, is a party to a case pending before the United States Forest Service in which an Indian tribe is seeking to block, on free exercise grounds, approval of a mining plan in northern Arizona. The proposed mining involves federal lands located in the Kaibab National Forest, some 30 miles from the nearest reservation boundary. This same Indian tribe is claiming that "thousands" of similar sites, encompassing a large portion of northern Arizona, are sacred. Their religion, they claim, prohibits them from disclosing the locations of any such sites at this time.

In a similar action, the Blackfeet Tribe is seeking control of over 200,000 acres of public and private land in the Sweet Grass Hills area of Montana based on religious objections. The Indians are relying on the lower court's decision in the present case for the proposition that this entire area must be "protected" from mineral

development. These examples illustrate that the Court's decision in the instant case is likely to affect mineral exploration and development projects throughout the nation's public lands.

### SUMMARY OF ARGUMENT

The First Amendment provides absolute protection for an individual's freedom of conscience. It does not mandate government compliance with religious viewpoints, and it has never before been interpreted to restrict the government's use of public land and natural resources. The Free Exercise Clause has provided the basis for relief when the government has conditioned benefits on the renunciation of religious beliefs, and when burdensome government regulations have compelled individuals to violate the tenets of their religions. The case before the Court represents neither unconstitutional conditioning of benefits nor oppressive government regulation. Rather, it is an attempt by the respondents to force the government to conform the use of its property to their religious beliefs. This is clearly beyond the scope of First Amendment protection.

Moreover, there is no unconstitutional burden on respondents' free exercise of religion. Respondents seek to control public land use to avoid any *inconvenience* to their religious practices. They may consider the pristine character of the high country of Six Rivers National Forest to be essential to their religion, but the government is under no obligation to protect and maintain it. While not required by the Constitution, genuine efforts have been made by the Forest Service to be responsive



to Indian interests. Indeed, the Forest Service offered to preserve the pristine character of over 5000 acres of this area for religious use by the respondents. Any remaining inconvenience to respondents does not amount to an unconstitutional burden. Moreover, *amici* believe that any creation of a religious "preserve" by the government would violate the Establishment Clause of the Constitution.

The government's interest in the orderly use of public lands and resources is compelling. The courts should not consider public land use decisions on a piecemeal basis because it can be argued that only those projects of enormous scope are compelling. A narrow view of the government's interest effectively vests religious groups with tremendous power over many public land use decisions that interfere with their religious beliefs or practices. A larger national interest in fully informed, carefully balanced land use must be recognized.

Disputes between the government and those who practice site-specific religion on public land involve competing interests of profound importance. Unless the Court imposes a threshold requirement that recognizes only direct and significant infringements on central and indispensable religious uses of public land, the nation's interest in the orderly development of natural resources will be seriously jeopardized.

*Amici* respectfully urge the Court to articulate a standard as to what constitutes an unconstitutional "burden" on religion in the context of public land

and resource use. A narrow interpretation of the Free Exercise Clause, which requires a significant and direct religious burden before judicial scrutiny becomes necessary would best serve the broad national interest while at the same time safeguarding the constitutional policy of protecting religious beliefs. It would also promote compromise, which is a highly desirable, and in many cases the only reasonable solution.

## ARGUMENT

### I. THE FREE EXERCISE CLAUSE DOES NOT BAR SECULAR GOVERNMENT ACTIONS ON PUBLIC LANDS

The religion clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *U.S. Const.* amend. I. Unquestionably the free exercise of religion is a fundamental right. *Reynolds v. United States*, 98 U.S. 145 (1878). However, this guarantee of religious freedom is not absolute. "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

This Court and others have repeatedly held that the First Amendment may not be asserted to deprive the public of its normal use of an area. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969); *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982),

*aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985). Although the government is not being denied physical access to the high country, it is being deprived of its preferred uses of such area and of all benefit of the publicly owned natural resources. The remedy imposed by the lower court, which requires an area of public land to be managed in accordance with religious beliefs, is inappropriate because the Free Exercise Clause does not apply to claims of this type. "[T]he free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out." *Crow v. Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1980), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

In *Bowen v. Roy*, 106 S. Ct. 2147, 90 L. Ed.2d 735 (1986), eight justices observed that the First Amendment had never been interpreted "to require the government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 90 L. Ed.2d at 744 (emphasis in original). Instead, the First Amendment prohibits burdens that force an individual to choose between a government benefit and a religious belief, or penalize an individual for his or her religious convictions. Even in this context free exercise protection is not absolute: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice it-

self, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

Construction of the G-O Road in the Six Rivers National Forest would not penalize respondents for their religious beliefs or prohibit them from acting on those beliefs. It might make certain practices more difficult, but that is not a cognizable First Amendment claim and does not require a restriction on the government's use of its land and natural resources.

## II. THE PROPOSED GOVERNMENT ACTION DOES NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THERE IS NO BURDEN ON THE FREE EXERCISE OF RELIGION

A substantial body of law has developed under a fairly narrow application of the Free Exercise Clause. Successful claims typically challenge government actions which either condition a benefit on the renunciation of a religious practice, *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) (unemployment benefits denied to Jehovah's Witness who refused to work at armament factory, believing it to be inconsistent with his faith); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist's refusal to work Saturdays disqualified her from eligibility for unemployment benefits), or compel an individual to violate the tenets of his religion. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory school attendance violated religious practice of home teaching beyond eighth grade). The respondents have not alleged that the government

has forced them to act in a manner that is inconsistent with their religious principles, and there is no conditioning of benefits that would force a compromise of their religious beliefs. Indeed, the proposed government action will merely inconvenience<sup>3</sup> their religious practices. This inconvenience does not constitute a sufficient infringement to merit free exercise protection. "*Sherbert* and *Thomas* hold only that the government may not, by conditioning benefits, penalize adherence to religious belief. Many government actions may offend religious believers . . . but unless such actions penalize faith, they do not burden religion." *Wilson v. Block*, 708 F.2d 735, 741 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

Courts interpreting the Free Exercise Clause gener-

<sup>3</sup> This inconvenience is considerably mitigated by the Forest Service's proposal to set aside over 500 undisturbed acres around each of eleven sites disclosed by respondents to have religious significance. Further concessions by the government to bar any actions that would create noise or visual disturbances would violate the Establishment Clause. See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 704 (9th Cir. 1986) (Beezer, J., dissenting).

A three-pronged test for determining the validity of government actions under the Establishment Clause was articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), where the Court stated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). The decision of the lower court violates the Establishment Clause under all three prongs of the *Lemon* test: the purpose is wholly non-secular; its principal effect advances religion by creating a religious sanctuary; and the government, by conforming its actions to the religious wishes of the respondents, has become entangled with their religion. The remedy afforded by the lower court is much more than an accommodation of the respondents' religious rights, and it therefore violates the Establishment Clause of the First Amendment.

ally impose a requirement that the government action constitute a "coercive" effect on the plaintiff's practice of religion. *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985). The religious inconvenience created by the Forest Service certainly does not rise to the level of "coercive." In *Grove*, the Court of Appeals for the Ninth Circuit recently noted, "While [the Free Exercise Clause] protects individuals from governmental interferences with their religion in the absence of compelling justification, it does not protect the individual from being religiously offended by what the government does." *Grove*, 753 F.2d at 1542. (citing *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984)).

Due to the lack of a burden and the complete absence of any coercive effect on the free exercise of religion, the proposed government action does not burden the free exercise of religion.

### III. THE COURT SHOULD IMPOSE A THRESHOLD REQUIREMENT ON RELIGIOUS CLAIMS AGAINST PUBLIC LAND USE DECISIONS

The analysis of free exercise claims involves a balancing test that appears straightforward: Government actions that burden the free exercise of religion are prohibited unless those actions are necessary to achieve a compelling government interest. *Wisconsin v. Yoder*,



406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). In determining whether a religious burden is present, the courts typically require the belief or practice to be "rooted in religion," *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), "central" and "indispensable" to the plaintiff's religion, *Abington School District v. Schempp*, 374 U.S. 203 (1963), and the government action must result in a "coercive effect" on the practice of religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). Underlying these requirements appears to be a consideration of the societal interests involved, and the potential impacts of the court's decision.<sup>4</sup> While this test has proven suitable in cases involving individuals seeking religious based exemptions from burdensome government regulations, "conventional free exercise analysis undergoes considerable strain when it is applied to site-specific religions centered on public lands." *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 695 (9th Cir. 1986).

In a case that did not involve the use of public lands or resources, or serious societal consequences, the *Sherbert* Court used seemingly absolute language to define the scope of the Free Exercise Clause:

If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's consti-

<sup>4</sup> For example, the *Reynolds* Court found that bigamy had been made a crime by Congress because of the "evil consequences" of plural marriages. *Reynolds*, 98 U.S. at 168. The *Cantwell* Court considered whether religious solicitations would permit the "perpetration of frauds under the cloak of religion." *Cantwell*, 310 U.S. at 304. The *Braunfeld* Court discussed the unfair economic advantage the plaintiffs would realize if they were exempted from Sunday closing laws. *Braunfeld*, 366 U.S. at 610-00.

tutional challenge, it must be either because her disqualification as a beneficiary represents *no infringement* by the State of her constitutional rights of free exercise, or because *any incidental burden* on the free exercise of appellant's religion may be justified by a 'compelling state interest.'

*Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (emphasis added)). This approach may be acceptable when the government is asked to accommodate individuals by exempting them from laws that burden their beliefs. It fails, however, when it is applied to religious claims against public land and resource use decisions. It is simply too inflexible to accommodate the national interest in management of one third of the nation's land and most of its natural resources. This broad construction in the public land use context effectively closes "the channel between Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas*, 450 U.S. at 721 (Rehnquist, J., dissenting).

In the instant case the Ninth Circuit ignored the flexible doctrine developed in the *Reynolds* line of cases, which sensibly considered the government's interests. Instead, it applied the *Sherbert* "any infringement" test and shifted the burden to the government to demonstrate a compelling interest due to the anticipated presence of an alleged<sup>5</sup> religious burden that would result from any change in the pristine character of the public lands in

<sup>5</sup> Because Indian religions are largely undocumented, and often considered secret by their members, it is generally difficult or impossible to test an allegation that a particular area of public land has religious significance.

question. Under this interpretation there is no room for compromise; if the government's interest is not compelling, the proposed use of public lands is prohibited. This approach ignores the needs of our complex society. "We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life." *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.).

Rather than strain the analysis to fit the claim, as the lower court did, the Court should adopt a variation of the approach formulated by the Court of Appeals for the District of Columbia Circuit in *Wilson* and impose a threshold requirement on religious claims affecting public land or resource use. See *Wilson*, 708 F.2d at 744 n.5 ("government land uses . . . can burden the right to freedom of practice only if site-specific religious practices are *significantly impaired* . . .") (emphasis added). This modified standard is necessary in cases where site-specific religious practices conflict with public land uses to avoid uniformly favoring religious over non-religious land uses. When the government seeks to recover natural resources from public land, its actions should be restrained on religious grounds, if at all, only when such actions directly and materially infringe upon religious practices that are central and indispensable to the faith.

Any religious burden that exists in the present case is insignificant and indirect. The road construction and logging may be inconsistent with the respondent's beliefs, and it may cause spiritual disquiet, but this is not the type of interference with religious belief that was con-

templated by the *Yoder* Court, and it is surely beyond the foresight of those who framed and adopted the First Amendment. The Indians will always be able to claim that any change in the pristine character of their aboriginal lands will cause spiritual disquiet. However, in the absence of a direct and significant impact upon a central and indispensable religious practice, such claims should not warrant constitutional protection.

Clearly, government land use decisions or policies that discriminated against a religious group or invidiously denied religious use of public land would offend the Constitution. A fully informed secular land use policy or decision, however, does not violate the Constitution merely because that policy or decision also impacts a certain religious group. Before a government land use decision is prohibited on free exercise grounds an individual first should be required to demonstrate a direct and significant burden on a central and indispensable religious practice. Nothing less should suffice.

#### IV. THE GOVERNMENT'S INTEREST IN INFORMED PUBLIC LAND MANAGEMENT IS COMPELLING

The government's interest in managing, preserving and producing natural resources from public lands is compelling. See *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985). The lower court undervalued the government's interest by isolating one particular pro-

posals. Judge Beezer, dissenting, noted, "While the government has many obligations that are not shared by private landowners, the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits." *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 704 (9th Cir. 1986) (Beezer, J., dissenting).

If the government's interest is measured by the benefits of a particular mine, well, or timber sale, the religious interest will, using the reasoning of the lower court, often appear paramount. The mineral, oil, or timber is usually available—at a higher cost—from some other source. But such an approach ignores the larger national interest in the proper and efficient management and development of public land and resources. When this interest is broken down into its component parts, the compelling nature of the interest is obscured. Consequently, when the range of "acceptable" land uses is narrowed to accommodate religions that embrace vast tracts of public land, the cumulative effects will seriously undermine the public's interest in proper and efficient management of its land and resources.

Public land and resource decisions are not made lightly. Often, as here, they are made on the basis of exhaustive environmental analyses and years of full participation of the public, including affected Indians. The Court is urged to reject the lower court's narrow characterization of the government interest and hold that prudent and informed management of public lands and resources is itself a compelling interest. Such a holding

would not exempt government land use from the Free Exercise Clause because the government would still be required to adopt the least burdensome means of achieving that interest. Thus, government actions could be tailored to minimize the impact on religious beliefs without foregoing development of significant public resources.

### CONCLUSION

While it is true that the freedom to believe is at the foundation of fundamental rights, this freedom should not limit the government's use of its resources. The "any infringement" standard referred to by the *Sherbert* Court should be confined to situations in which the requested relief is a personal exemption from burdensome government regulation. It is wholly inapplicable to claims of religious infringement based on public resource development because it operates to restrict the needs of many to conform to the religious demands of few. Public lands and resources belong to everyone, and to proscribe otherwise appropriate uses of large areas of public lands to conform to the religious tenets of any one group is beyond the scope of the First Amendment.

Because there is only a vague religious infringement present—that on the "salient qualities" of the high country—to uphold the decision of the lower court would have potentially devastating effects on public land management and resource development by giving groups whose religious practices occur on public land significant control over many competing public land uses they find objectionable. To recognize a constitutional bar to the government's preferred use of its land and natural resources



under such tenuous circumstances would open the door to a deluge of similar claims against the government.

For the reasons discussed above, *amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

LAWRENCE E. STEVENS

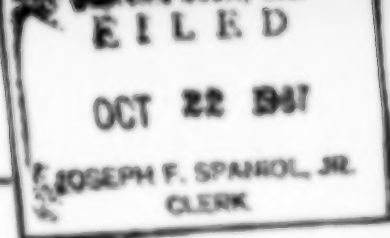
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**AMICUS CURIAE**

**BRIEF**

No. 86-1013



IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1987

RICHARD E. LYNG, SECRETARY OF  
AGRICULTURE, ET AL.,  
Petitioners,  
v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, ET AL.  
Respondents.

On Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL  
CONGRESS OF AMERICAN INDIANS,  
ASSOCIATION ON AMERICAN INDIAN  
AFFAIRS, THE KARUK TRIBE OF  
CALIFORNIA, THE TOLOWA NATION,  
THE HOOPA TRIBE OF CALIFORNIA,  
THE CONFEDERATED SALISH AND KOOTENAI  
TRIBES OF MONTANA, THE KOOTENAI  
TRIBE OF IDAHO AND THE TUNICA-BILOXI  
TRIBE OF LOUISIANA  
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October 1987

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## STATEMENT OF INTEREST OF AMICI

The National Congress of American Indians and the Association on American Indian Affairs are dedicated to protecting the rights and improving the welfare of American Indians. NCAI is the oldest and largest national organization of Indian governments and individuals in the United States. AAIA is the largest Indian-interest organization in the country, with a membership that includes both Indians and non-Indians. Both organizations routinely file briefs amicus curiae in Supreme Court cases.

The religious and cultural affairs of the tribes which have filed this brief amici curiae are routinely affected by the decisions of federal agencies to engage in development related activities on public lands which incorporate the tribes' aboriginal territories.

Amici are vitally concerned that the traditional strict scrutiny standard in free exercise jurisprudence be applied to the land management decisions and practices of federal agencies.

#### SUMMARY OF ARGUMENT

Much of the factual record in this case was developed by the Forest Service pursuant to the dictates of the American Religious Freedom Act of 1978 ("AIRFA"). That evidence concluded that the impacts of road construction burdend the religious practices of the Yurok, Karuk and Tolowa Indians, and the government's interests were not compelliing. Rather than accommodating the Indians' paramount claims, the government argues that there is per se no burden on religion stemming from construction of the road and that its interests in construction should be judged

by a less stringent standard of reasonableness.

Amici submit that the standards by which the proposed government actions here are to be judged should conform to traditional free exercise precedent. There is no legitimate basis for changing the free exercise test. Indeed, the Court has an opportunity to clarify the test in the context of Indian religious claims to sacred geography, and to correct the analytical flaw in the test adopted by lower federal courts in Sequoyah and Wilson. As a remedial federal statute based on legislative fact-finding, AIRFA informs the scope of Indian free exercise rights and compels a change in the process and substance of federal agency decisions, such as the one presently before the Court.



## ARGUMENT

### I.

THE COURT SHOULD FOCUS ON THE UNIQUE  
NATURE OF INDIAN RELIGION TO DETERMINE  
WHETHER THE EFFECT OF GOVERNMENT ACTION  
PRODUCES AN IMPERMISSIBLE INFRINGEMENT

#### A. Introduction.

Throughout the long history of this case, the government has never challenged the claims of the Yurok, Karuk and Tolowa Indians concerning the role of the "high country" in their religious rituals, and the need to preserve the physical integrity of that area for ritualistic use. Gov. Br. 20.<sup>1/</sup> Indeed, the findings of the government's own experts have confirmed these values. Instead the government has offered a novel interpretation of the free exercise clause under which federal land

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<sup>1/</sup> The precise geographic boundaries of the high country are not well defined, but include at least the 1200 foot corridor through the wilderness set aside by Congress in the California Wilderness Act of 1984 to allow the judiciary to resolve this dispute. See discussion, infra.

management activities as a matter of law do not "burden" Indian religion:

This Court's decisions define the freedom to act guaranteed by the Free Exercise Clause as the right to shape one's own religious conduct free from the influence of coercive government action, whether in the form of direct regulation or in the form of conditions upon a public benefit that require the compromise of religious faith. The decisions to build the road and adopt the land management plan do not fall into either of these categories.

Gov. Br. 16. Under such a theory, Indians would be absolutely prohibited from presenting any religion claim to an administrative agency or court of law of sufficient importance to be entitled to first amendment protection.

This limitation on the scope of the first amendment is not formed in any case law, or found in any rational interpretation of the Constitution.

Supreme Court precedent instead focuses on

the effect of government laws and regulations on religion, without limitation as to circumstance. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (law is constitutionally invalid if "purpose or effect" is to "impede the observance" of religion); Walz v. Tax Commission, 397 U.S. 664 (1970); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Thomas v. Review Board of the Indian Employment Security Division, 450 U.S. 707, 717 (1981); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. \_\_\_, 94 L.Ed.2d 190, 197 (1987).<sup>2/</sup>

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<sup>2/</sup> That free exercise claims are more frequently raised in one of the contexts framed above by the government is attributable more to the nature of our complex society than other identifiable factors. "Even if the Founding Fathers did not live in a society with the 'broad range of benefits [and] complex programs' that the Federal Government administers today, . . . , they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause. Bowen v. Roy, 476 U.S. \_\_\_, 90 L.Ed.2d 735, 765 (1976).

The fact that the Indians' claims here arise in a context somewhat unfamiliar or unorthodox context, however, "does not grant the Government [or this Court] license to apply a different version of the Constitution. . . ." Bowen v. Roy, 476 U.S. \_\_\_, 90 L.Ed.2d 735, 765 (1976) (O'Connor, J.). Rather, the modern expression of the free exercise test when applied in the context of this case will adequately assess the respective government and Indian claims here. To determine whether the primary effect of the government land management activities on the high country would burden Respondents' religion, the Court must focus on the unique nature of Indian religion and its ties to sacred geography. The government's theory would entirely avoid such an analysis.

## B. The Unique Nature And Needs of Indian Religion

The fundamental characteristics of Indian religion must be understood before one can accurately determine whether government conduct will have an impermissibly coercive effect. In its brief, the government summarizes the religious beliefs of the Yurok, Karok and Tolowa Indians, and their spiritual connection to the high country, but then ignores the role these beliefs and practices should play in circumscribing federal land management practices. Gov. Br. 2-4. One is left with the impression that the government either misunderstood or deliberately ignored the religious claims to the high country. That mistake should not carry over into the Court's deliberations or decision here.

The Historical Overview section of the American Indian Religious Freedom Act

Report (August 1979), produced by the Federal Agencies Task Force, as mandated by Section 2 of the American Indian Religious Freedom Act of 1978, Pub. L. 95-341, 92 Stat. 469, 470 (1978) ("AIRFA"), provides an excellent historic framework within which to consider the Indians' claims. The AIRFA Report explains that a "vast difference exists between the major or 'world' religions and the religions of smaller tribal groups." Report, p. 8.

The larger religions can best be described as "commemorative" religions. That is to say, these religions trace their origins back to a specific person or event (The Exodus, Jesus, Mohammed, Buddha, etc.) and the major portion of the religion deals with commemorating these sacred events in the proper ceremonies and rituals (Holy Communion, Passover, etc.)

\* \* \*

Since these religions are commemorative and depend upon a reenactment of the original revelation, the location of rituals and ceremonies is not nearly as important as the continuing tradition in which the



original truth is manifested. Id.  
at pp. 8-9.

In juxtaposition are the fundamental  
doctrinal elements of Indian religion:

The smaller or tribal religions represent the opposite pole of human experience. Instead of commemorating events, these religions are what could best be described as "continuing" religions in that they are not traced to a founding or founder. Their origin is clouded beyond recovery and almost all of them can be said to be older, in a chronological sense, than the founded religions since we must assume that they existed in one form or another before the founding of any of the major religions, almost all of which can be dated with a fair degree of accuracy.

The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must be conducted in accordance with the instructions given in the original revelation of each particular ceremony or ritual. Of critical importance in this respect is the manner in which ceremonies arise. These religions have the ability and propensity to experience new revelations and each new ceremony which is received by the religious community is given for a specific

purpose and must be performed at the place and in the manner, and wherever the original revelation demands, at the time designated. American Indian tribal religions, in many instances, have acknowledged that the present ceremonies, given to them at the beginning of this world, must be performed continuously or great harm and destruction will come to the people.

\* \* \*

The primary essence of the tribal religions is to remain in a constant and consistent relationship with nature and moral and ethical considerations must originate in a world which demands mature responsibility. Customs which adjust to the natural world and its inhabitants thus dominate the tribal religions where laws and institutions are the dominant factors in the larger religions.

Id. at pp. 10-11 (emphasis added).

Dr. Deward E. Walker, Jr., Professor of Anthropology at the University of Colorado, has spent 30 years conducting primary research on Indian religion. He describes the differences thusly:

Among American Indians the sacred is more founded on the idea that it is an embedded attribute of all

phenomena. For example, among the Lakota this attribute is wakan, whereas among the Algonkians it is manitou. Accessing this sacred attribute is a major ritual goal found in all American Indian cultures and entails actually entering sacredness, rather than merely praying to it or propitiating it. Whereas Judeo-Christian religions tend to arbitrarily create their own sacred space and times by special rituals of sacralization, American Indians attempt to discover "access points" or "portals" to the sacred that are often impossible to know before the dreams or visions that reveal them. Despite this, there are underlying regularities concerning where such access points to the sacred are most often located.

Walker, Deward E., Jr., "Protection of American Indian Sacred Geography: Toward A Functional Understanding of Indian Religion Focusing on a Protective Standard of Integrity" at p. 7<sup>3/</sup>

In deliberations on AIRFA Congress

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<sup>3/</sup> Paper presented as a keynote address to the Harvard Center for the Study of World Religions' Workshop on Sacred Geography, May 5-6, 1987, Cambridge, Massachusetts (hereinafter "Walker"), reprinted as Appendix A hereto.

recognized the fundamental importance of Indians' maintaining harmony with and an essential connection to sacred land and other spiritual elements of nature. When considering the importance of sacred geography, for instance:

The first is restrictions in space or where Indians are denied access to a physical location. There are certain sites, a hill, a lake, or a forest glade which are sacred to Indian religions. Ceremonies are often required to be performed in these spots. To deny access to them is analogous to preventing a non-Indian from entering his church or temple. Most of these sites not in Indian possession are owned by the Federal Government and a few are on State lands. Federal agencies such as the Forest Service, Park Service, Bureau of Land Management and others have prevented Indians in certain cases from entering onto these lands. The issue is not ownership or protection of the lands involved. Rather, it is a straight-forward question of access in order to worship and perform the necessary rites.

123 Cong. Rec. 519766 (December 15, 1977)

(remarks of Senator Abourezk).<sup>4/</sup>

Congressman Udall, AIRFA's chief sponsor in the House of Representatives, eloquently framed the cruel irony of the dilemma facing Indian people:

It is stating the obvious to say that this country was the Indians long before it was ours. For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.

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<sup>4/</sup> Years earlier, Commissioner of Indian Affairs John Collier noted the importance as a matter of federal policy of maintaining Indian ties to land:

So intimately is all of Indian life tied up with the land and its utilization that to think of Indians is to think of land. The two are inseparable. Upon the land and its intelligent use depends the main future of the American Indian.

1938 Report of the Commissioner of Indian Affairs quoted in United States Civil Rights Commission, Religion in the Constitution: A Delicate Balance (1983) at 30.

124 Cong. Rec. H6842 (July 17, 1978).<sup>5/</sup>

The AIRFA Report stressed the importance of preserving the natural conditions of land as an essential element of protecting ritualistic practices:

Physical access to the land and its natural products must also include the preservation of the natural conditions which are the sine qua non of that access. The efficacy of the natural products and the spiritual well-being of the sacred sites are dependent upon physical conditions. Changing of physical conditions . . . not only damages the spiritual nature of the land, but may also endanger the well-being of the Native religious practitioners in their role and religious obligation as guardians and preservers of the natural character of specific land areas.

Report, supra, at 54. See also, Walker, Appendix A, pp. 12-22.

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<sup>5/</sup> Chief Justice Burger noted in Yoder, supra, 406 U.S. at 226-27, that where a religious way of life existing long before government is threatened by government action, the free exercise clause protects the religion against all but the most compelling of state needs. This argument is apropos to Indian sacred sites which predate the formation of the Union or statehood.



In the present case, the Court should not "apply a different version of the Constitution" to defeat the Indians' claims. The claims are unique; but Congress through AIRFA has recognized the tremendous value to American society in preserving religious and cultural diversity.<sup>6/</sup> As set forth in the next section, amici seek a fair application of the Sherbert-Yoder-Thomas test to these claims.

## II.

### THIS COURT HAS AN OPPORTUNITY TO CLARIFY AND CORRECT THE MISAPPLICATION OF THE FREE EXERCISE TEST IN CASES INVOLVING INDIAN CLAIMS TO SACRED GEOGRAPHY

#### A. Introduction.

Five federal circuit courts of appeals

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<sup>6/</sup> "America does not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would all be poorer if these American Indian religions disappeared from the face of the Earth." 123 Cong. Rec. 519766-67 (December 15, 1977) (remarks of Senator Abourezk).

have now considered and ruled on cases involving Indians' first amendment free exercise rights implicated by the management of government land or resources.<sup>7/</sup> Native parties challenging government conduct have prevailed only once, in the case presently before this Court.<sup>8/</sup> The lack of success by Indian

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<sup>7/</sup> Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Fools Crow v. Gullett, 706 F.2d 856 (8th Cir.), cert. denied, 464 U.S. 977 (1983); Northwest Indian Cemetery Protective Ass'n. v. Peterson, 795 F.2d 688 (9th Cir. 1986) (Lyng); Inupiat Community v. United States, 746 F.2d 570 (9th Cir. 1984), cert. denied, 474 U.S. 820 (1985); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); and Wilson v. Block, 708 F.2d 735 (D.C. Cir.) cert. denied, 464 U.S. 456 (1983). See also United States v. Means, 627 F.Supp. 247 (D.S.D. 1985), appeal pndg., No. 87-5118SD (8th Cir.).

<sup>8/</sup> The Indian claimants also prevailed in the Federal District Court in South Dakota in Means. The case is presently on appeal before the Eighth Circuit. See note 7, supra. Kootenai Indians of Montana, Idaho and British Columbia were recently successful in defeating an application by a group of Idaho and Montana rural electric cooperatives to the Federal Energy Regulatory Commission for a license to construct a dam and hydroelectric project at a sacred waterfall--Kootenai Falls--on the Kootenai River in northwest Montana.

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religious claimants in sacred site cases raises a perplexing question: have their factual claims been so poor, or poorly litigated, as to deprive them of first amendment protection? Or is there something fundamentally wrong with the articulation and application of the modern free exercise test by the lower courts considering their claims?

There may be elements of the first two problems flaws in each of the above cases. But amici submit that the major contributing factor is a flaw in the lower courts' analysis in Indian sacred site decisions which on balance discriminates against Indians by holding them to a higher

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8/ -Continued -

FERC did not reach the first amendment claim of the Kootenai, ruling that under Section 10(a)(1) of the Federal Power Act, 16 U.S.C. 803(a)(1), it was not in the "public interest" to violate the religious and cultural rights claimed by the Kootenai to the Kootenai Falls area. See In re Northern Lights, Inc., Project No. 2752-0000, Op. No. 276 (June 25, 1987).

legal and factual standard than other religious claimants in other contexts. The flaw rests in the sufficiency of proof to meet the "burden" prong in terms of the "centrality" and "indispensability" of religious practice. Courts have interpreted this standard to require factual proof of the extinction or survivability of a religion as a precondition to meeting the burden prong. Even the Ninth Circuit in the present case has relied on this misstatement of the test.

Yet despite the confusion over the correct standard, none of these courts have articulated or adopted such a rigid, wooden interpretation of the "burden" prong as that advanced by the government here. At a minimum, the government's argument should be rejected. Amici set forth below what they believe to be a functionally more appropriate expression of the free exercise

test, which this Court should adopt for Indian sacred site cases.

**B. Government Actions Which Impair The Integrity Of Religious Practices By Altering Necessary Natural Conditions At Sacred Sites On Public Lands Impermissibly Burden Indian Religion.**

The Supreme Court's expression of the free exercise doctrine in the modern era can be fairly traced to Sherbert v. Verner, supra. There the Court mandated payment by South Carolina of unemployment compensation benefits to Adelle Sherbert, who was fired for her refusal to work on Saturday, her Sabbath. Ms. Sherbert met the "burden" prong of the free exercise test: the "effect" of the state unemployment compensation law was found to "impede the observance" of the Seventh-day Adventist religion. Sherbert, supra, 374 U.S. at 404. The state's asserted interests for denying her benefits, by the Court's analysis, were too specious, speculative and unproven to meet the compelling

government interest standard. Sherbert, supra, 374 U.S. at 406-09.

Nine years later, in Wisconsin v. Yoder, supra, the Court followed essentially the same doctrinal approach to strike down a Wisconsin law requiring public school attendance beyond the eighth grade, as abridging the religious free exercise rights of Jonas Yoder and Wallace Miller. Again the burden of prong was met: the effect of the compulsory school attendance law on the Amish was held to be "not only severe, but inescapable." Yoder, supra, 406 U.S. at 218. This doctrinal approach was again affirmed in Thomas, supra, 450 U.S. at 717 ("pressure upon [the] employee to forego that [religious] practice is unmistakable."); and most recently in Hobbie, supra, 94 L.Ed.2d at 197.

The modern free exercise doctrine can thus be stated as follows: to establish as



impermissible a burden on sincerely held religious beliefs, an individual or group must show that the primary effect of government action or conduct is to impede the observance or worship of practices associated with that religion.

How then should the "burden" prong of the free exercise analysis be phrased and applied to fairly evaluate the unique nature of Indian claims to sacred land? From decisions in the three best known Indian sacred land cases--Sequoyah, Wilson and the decision below in Northwest Indian Cemetery--we see that the courts all began with the essential test from Sherbert and Yoder, but then misread this precedent to require proof of "centrality" and "indispensability" of religious rituals or certain geographic areas as a precondition to meeting the burden prong. This approach has improperly placed courts in the

position of making subjective, ethnocentric judgments as to the degree or severity of impact on religious doctrine.<sup>9/</sup> And courts have interpreted it to require a factual showing of virtual extinction of an Indian religion before the full free exercise test is triggered.

Consider first the decision of the Sixth Circuit Court of Appeals in Sequoyah v. Tennessee Valley Authority, supra. After reciting the modern Sherbert-Yoder free exercise test, the Sixth Circuit misread Yoder to require the "first step in this analysis. . . as evaluating the 'quality of the claims' alleged to be religious." Sequoyah, supra, 620 F.2d at 1163.

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<sup>9/</sup>Amici submit that, despite the dangers inherent in weighing the severity of burden on religion, as discussed below, it is a necessary exercise in "balancing" the respective religious and government interests under the second prong of the free exercise test. But measuring severity of burden cannot appropriately be used as a threshold device to frustrate Indian religious claims.

The extensive discussion in Yoder of the fundamental beliefs of Old Order Amish religion and its inseparability from Amish way of life,<sup>10/</sup> and a fundamental misreading of two Indian religion cases in other contexts, People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964),<sup>11/</sup> and Frank v. Alaska, 604 P.2d 1068 (Alaska 1979),<sup>12/</sup> served as the basis for the

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<sup>10/</sup> "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." Yoder, supra, 406 U.S. at 210 (emphasis added).

<sup>11/</sup> Jack Woody and several other Indians were convicted in state court for illegal possession of peyote. The California Supreme Court reversed the convictions on the ground that the Indians had a first amendment right to possess peyote, and the state's interests were inadequate to outweigh the burden on religion.

<sup>12/</sup> Frank involved a state prosecution of an Athabascan Indian, Carlos Frank, for unlawful transportation of game illegally taken. The Supreme Court of Alaska reversed the conviction, on religious free exercise grounds, because the moose was killed for a "potlatch" ceremony following the funeral of a fellow Athabascan Indian. The State did not have a compelling need to prevent the taking of the moose for religious purposes.

Sixth Circuit's denial of the Cherokee's claim: the evidence disclosed "no such claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances." Sequoyah, supra, 620 F.2d at 1164.

To buttress its "centrality" test the court in Sequoyah referred to evidence adduced in Frank. But the language relied upon from Frank actually established that moose meat, though important, was not essential or central to the potlatch ceremony, or to the survival of Athabascan culture. Other game could be substituted depending on the location of the ceremony. Frank, supra, 604 P.2d at 1072. Moreover, Sequoyah completely ignored the legal standard employed by the Alaska Supreme Court in Frank to determine the efficacy of the free exercise claim, which was much broader and more in keeping with Sherbert than that espoused by the Sixth Circuit:

[a]bsolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in a religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification.

Frank, id., 604 P.2d at 1072-73.<sup>13/</sup>

The Sequoyah court also referred to the language in Woody, where the California Supreme Court had described peyote as the "theological heart" of the Native American Church. As in Frank, the evidence in Woody concerning centrality assisted the court in measuring the severity of burden but did not state a legal standard by which to judge whether a burden in fact existed such that an examination of the government's interest was required.

The Court of Appeals for the District of Columbia, in Wilson v. Block, 708 F.2d

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<sup>13/</sup> See also Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975) (wearing long hair need not be proven to be an "absolute tenet" of Indian religion. "Proof that the practice is deeply rooted in religious belief is sufficient.").

735 (D.C. Cir. 1983), also misread Yoder to reject Navajo and Hopi religious objections to expansion of a ski area in the San Francisco Peaks in Arizona. Wilson, 708 F.2d at 742-44. As in Sequoyah, the Wilson court interpreted Yoder to require absolute proof of a geographic area's centrality and indispensability to Indian religious practice before the burden prong had been met:

We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.

Wilson, supra, 708 F.2d at 744.

Thus, in Wilson, proof of the destruction of a sacred place, the forced abandonment of that place for ceremonies, and the environmental and theological degradation of the mountain, which religious power derived from the mountain's



natural conditions, still fell short of establishing the requisite factual violation to meet the burden prong. The import of the decision in Wilson was that any infringement on the Navajo and Hopi religions, which fell short of rendering physically impossible the conduct of religious ceremony anywhere, did not constitute a burden cognizable under the first amendment.<sup>14/</sup>

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<sup>14/</sup> One commentator has noted the inherent ethnocentric bias in the Sequoyah-Wilson test:

Sequoyah painfully demonstrates the ethnocentrism of such a limitation. The religion of the Cherokee is not protected. . . essentially because it is not like "our" religion. Particularly in relation to traditional Indian religion, the "centrality" doctrine eviscerates the Free Exercise Clause. . . To apply the "centrality" standard to such [Indian] religions, which perceive pervasive religious aspects of life, not compartmentalized, is to rule that no practice in such a pervasive religion is central and hence none merits first amendment protection.

Pepper, The Conundrum of the Free Exercise Clause - Some Reflections On Recent Cases, 9 N.Kty.L.Rev. 265, 283-85 (1982).

Similar to the decision in Sequoyah and Wilson, the Ninth Circuit decision in the present case initially tracks the Sherbert-Yoder standard. "Government action that makes exercise of first amendment rights more difficult or impedes religious observances may also be 'invalid even though the burden may only be characterized as being indirect.'" Pet. App. 11a. The Ninth Circuit correctly focused its primary inquiry on the nature of impact on Indian religion by proposed Forest Service activities: it found the proposed road construction invalid because it would "produce an irreparable impact. . . through the degradation of salient environmental qualities pertinent to the power [vision] quests of medicinal and spiritual practitioners. . . " Pet. App. 10a.

But the Ninth Circuit did not stop there; for that reason its analysis is also

wrong. The court's analytical flaw was to require, based upon the legal standard in Sequoyah and Wilson, that Indians demonstrate centrality and indispensability of religious practice or physical space as a precondition to meeting the burden prong. "The Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs, . . .," citing Wilson and Sequoyah. Pet. App. 7a. Requiring a showing of centrality or indispensability naturally shifts the focus to requiring factual proof of extinction or survivability of an entire religion or religious practice.

Dr. Walker has criticized this result from the standpoint of an expert anthropologist and ethnohistorian who works directly with Indian people on these matters.

As interpreted by the courts in the cases referenced by Michaelson (1986) above, "central" has a meaning best described as indispensable, essential, or requisite. The courts have,

therefore, introduced a very high standard that must be met for first amendment protection of American Indian sacred geography. Under this interpretation of central, preservation of a specific sacred site can only be achieved if it is deemed to be essential, indispensable, or requisite for the practice of a particular tribal religion. In its applications, this standard goes well beyond the meaning of "infringement" and borders on extinction." In other words, to receive first amendment protection, American Indians must demonstrate that a change will not merely infringe but virtually destroy a religious practice or belief. Judgments by courts as to centrality, therefore, are being made in terms of a standard of survival/extinction.

Walker, Appendix A, p. 22.

This approach is also fundamentally out of alignment with twenty-five years of Supreme Court precedent. For instance, the Court in Sherbert did not as a precondition to establishing infringement require Adelle Sherbert to prove that Saturday worship was a central, indispensable tenet of the doctrine of the Seventh-Day Adventist

Church; i.e., that her religion could only be practiced on Saturday and no other time.<sup>15/</sup> And the Court in Yoder did not as a condition of establishing infringement require Jonas Yoder and Wallace Miller to prove that compliance with Wisconsin compulsory attendance laws would destroy the practice of essential elements of Amish religious doctrine.

Some assessment of the degree of religious infringement is necessary in free exercise analysis, to determine whether beliefs are honestly held and rooted in religion. Obviously trivial or fraudulent

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<sup>15/</sup> Sherbert's religion was impermissibly violated under the burden prong because South Carolina law was found to "impede the observance" of her religion. The Court did refer to Saturday worship as a "basic tenet of the Seventh-day Adventist creed", but only in a footnote when assessing the strength of her claim and the degree or severity of infringement. See Sherbert, supra, 374 U.S. 399, n. 1. As in Sherbert, the lengthy discussion of the central, fundamental beliefs of the Old Order Amish in Yoder was directed to measuring the degree of burden, but was not used as a threshold test.

claims should not merit first amendment protection.<sup>16/</sup> There is still the danger that this invites subjective, ethnocentric judgments about the validity of minority faiths. But the point in the analysis at which that assessment occurs is critical. To the extent necessary an examination of the ritual use of sacred geography should not occur as a threshold inquiry to deny claims of Indian litigants, but only as a mechanism for balancing the respective individual and governmental interests at stake in a dispute such as that presented here.

The decision in Yoder may have invited its own misapplication. By inquiring into

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<sup>16/</sup> The first step in the Sherbert free exercise analysis - providing that sincerely held beliefs, rooted in religion, are at stake - should prevent spurious or fraudulent claims. See, e.g. Woody, supra, 394 P.2d at 821 ("... courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities."), citing United States v. Ballard, 322 U.S. 78 (1944).



the "quality of the claims" presented by the Amish, the Court opened up the possibility that lower courts might construe this as a threshold inquiry against which to mechanically compare the unorthodox beliefs and practices of other minority faiths. This Court has recognized the dangers inherent in allowing courts to pass judgment on whether an individual's religious claims are "central" enough or "fundamental" enough to shift the legal burden to the government to show a compelling interest sufficient to overcome such claims.

In Thomas, Chief Justice Burger cautioned against such an application of Yoder: he began his analysis by citing Yoder and Sherbert as authority for the standard that beliefs and practices are to be protected if "rooted in religion." Thomas, supra, 450 U.S. at 713-4. Whether a practice satisfies that standard must not

turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensive in order to merit First Amendment protection.

Id. at 714; cf. United States v. Lee, 455 U.S. 252, 257 (1982).<sup>17/</sup> The Court in Thomas accepted the "honest conviction that [Saturday] work was forbidden by [Eddie Thomas'] religion" as sufficient to meet the burden prong. Thomas, id. at 716. In other words, one year after the Sequoyah court misread Yoder as mandating judicial inquiry into the centrality and indispensability of religious practices, the Court in Thomas rejected such a narrow approach to free exercise analysis. The

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<sup>17/</sup> "No doubt the courts may properly question a defendant's honesty, sincerity and good faith; it would seem, however, that once a practice is deemed to be religious, questions regarding what is "essential" as opposed to "important", what is "indispensable" as opposed to "desirable" in a religion, is better left to theologians." Marcus, The Form of Conscience: Applying Standards Under The Free Exercise Clause, 1973 Duke L.J. 1217, 1250-51.

Wilson court ignored this clarification by the Supreme Court.

Such an approach does not unfairly tip the scales in favor of Indian religious claims to sacred lands. Those claims must still pass the second, "balancing" prong of the free exercise test in order to prevail. But on the other hand it does not allow courts, otherwise unfamiliar with the vagaries of Indian religion or predisposed to yield to the arrogance of perceived governmental needs, to avoid a fair balance of the respective interests at stake. Rejecting such "covert balancing" would likely change the outcome of some Indian sacred geography cases, but would not lead to a different result in all cases. Each case must be allowed to stand on its own factual merits.

But had the court in Sequoyah allowed a trial on the merits, the Cherokee may have been able to establish the requisite

"coercive effect" on their religion caused by the TVA's of flooding the Little Tennessee River Valley. The legal burden would have then shifted to the government to introduce evidence as to the nature of its interests. Whether those interests would have been found to be compelling is the subject of legitimate debate;<sup>18/</sup> but allowing a balancing process to go forward between the religious importance of the site and the government's interests would have preserved the integrity of the free exercise analysis and subjected the Sixth Circuit to less criticism.<sup>19/</sup>

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<sup>18/</sup> See Pepper, The Conundrum of the Free Exercise Clause, *supra*, pp. 227-290.

<sup>19/</sup> See Pepper, id.; cf. Barsch, The Illusion of Religious Freedom for Native Americans, 65 Or. L. Rev. 363 (1986); Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L. J. 1447 (1985); Note, Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?, 26 B.C. L. Rev. 463 (1985); Note, Native American Free Exercise Rights to the Use of Public Lands, 63 B.U. L. Rev. 141 (1983); Stambor, Mainfest Destiny and Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods, 10 Am. Ind. L. Rev. 1 (1982).

The same criticism can be directed at the Wilson decision. The District of Columbia Circuit was able to avoid any meaningful examination of the purported "government" interests in expanding a private ski area in the national forest. It ruled, instead, that the Indian litigants had not met their burden of showing an impermissible infringement on religious ceremonies, notwithstanding findings that the ski development would cause "spiritual disquiet" because the Indians

must have access to the Peaks to practice their religion. Certain of [their] ceremonies must be performed upon the Peaks and religious objects must be collected there.

Wilson, supra, 708 F.2d at 742 (emphasis added). Given the seriousness of the infringements in Wilson and Sequoyah, it is fundamentally unsupportable that the respective Indian and government interests

were never objectively weighed. Other circuit courts of appeals' decisions in Indian cases have produced similar disarray in free exercise analysis.<sup>20/</sup>

In the case at bar, the Ninth Circuit found infringement on religious practice under the centrality-indispensability standard and shifted the burden to the Forest Service to produce evidence of its interests. The government's interests were found not to be sufficiently compelling to outweigh those of the Indians. This is the correct result. But because of the

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<sup>20/</sup> See, e.g., Badoni v. Higginson, supra; Fools Crow v. Gullet, supra; Inupiat Community v. United States, supra. See also Dedman v. Hawaii Board of Land and Natural Resources, 740 P.2d 28 (Hawaii 1987), where the Hawaii Supreme Court found that the uncontroverted testimony by Pele religious practitioners of the impact on their religion by private development of state-owned geothermal resources constituted nothing more than the "mere assertion of harm to religious practices" and therefore did not meet the requirements of the burden prong. Id. at 32-33; Petition for Writ of Certiorari filed October 13, 1987, No. \_\_\_\_.



persistent flaw in the legal standard courts, if so inclined, have the means to permit the federal bureaucracy to hide behind broad sweeping claims of national interest and avoid having to explain under any legal standard actions which burden Indian interests. And, in real terms, the flaw permits courts to make subjective, ethnocentric judgments about the importance of Indian religious practices.<sup>21/</sup>

Had Adelle Sherbert been subjected to the rigors of the burden prong as

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<sup>21/</sup> The "centrality" standard, when used as a threshold litmus test, is subject to tremendous abuse. For instance, the Court in Yoder described Amish lifestyle as "not merely a matter of religious preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." Yoder, supra, 406 U.S. at 216. Using this dicta from Yoder as a backdrop to considering the centrality of Indian claims has obvious problems, by forcing Native religions into a homogeneous paradigm which forecloses genuine consideration of the unconventional nature of the doctrine and practice. AIRFA's policy statement requires the consideration and accommodation of unconventional Indian religious beliefs and practices. See discussion, infra, Section IV.

articulated in Indian sacred site cases, her claim would have failed. She simply could not have shown that the Seventh-Day Adventist religion can only be practiced on Saturday. Yoder would have met a similar fate; the Amish religion or some essential attribute of it would not become extinct solely because of the Wisconsin compulsory education law.<sup>22/</sup>

The government's crabbed interpretation of the circumstances under which the "coercive effect" of government conduct constitutes a burden completely leaves

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<sup>22/</sup> The recent decision by the Court in O'Lone v. Estate of Shabazz, 482 U.S. \_\_\_\_, 96 L.Ed.2d 282 (1987), is distinguishable from the present case both in terms of fact and result. The Jumu'ah, a weekly Muslim congregational service, is "commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer. 96 L.Ed.2d at 287. Notwithstanding the importance of these practices, respondents were denied access to Friday Jumu'ah services because of the apparent governmental interest in prison security. Those interests are entirely different from the perceived governmental interests here, which should be narrowly tailored to only consider the need for the construction of the G-O Road. See discussion, infra.

Indian sacred sites unprotected from the whim of government land management. For that reason alone, the Court should reject the government's argument. But in the decision here, the Court should be careful to also correct the analytical flaw which threads the tapestry of lower court decisions in Indian sacred site cases.

Indian religion is unique. The special relationship between Indians and the federal government is also unique. These factors compel the adoption and use of a contextually appropriate expression of the free exercise test in Indian sacred site cases which accords the same degree of religious free exercise protection afforded to other minority faiths. Dr. Walker argues that a standard which emphasizes the concept of protection of site or ritual "integrity" more fairly evaluates the free exercise claims of Indians:

Integrity is proposed here as an alternative standard, because it refers to "the quality or state of being complete and undivided," or simply to "customary practice." Infringement then can be understood as a forced or undesired change in the customary practice of a religion. Under the present centrality standard, infringement is not reached until the very existence or continued survival of the religion is threatened; even at this point it is still not clear exactly what centrality means. A desirable feature of a standard of integrity is that it is more open to factual investigation than a standard of centrality. Determination of whether the integrity of a religious practice has been violated would rest on answers to factual questions.

Walker, Appendix A, p. 23.

The Sherbert-Yoder standard, when expressed in functional terms appropriate to Indian sacred site cases, indeed correctly focuses on protection of the integrity of religious practice or sacred geography fundamental to that practice: Indians should be required to demonstrate that government action impairs the

integrity of the natural conditions of sacred areas necessary for the performance of religious ceremonies, or limits access to those areas. If Indians can put on sufficient evidence of burden to ritual or site integrity, the second prong of the free exercise test is then triggered.<sup>23/</sup>

### III.

#### THE TRADITIONAL ARTICULATION OF THE SECOND PRONG OF THE FREE EXERCISE TEST PRESERVES THE NECESSARY BALANCE BETWEEN THE SECULAR INTERESTS OF THE DOMINANT SOCIETY AND THE RELIGIOUS INTERESTS OF MEMBERS OF MINORITY FAITHS

The Ninth Circuit below correctly stated the traditional articulation of the second, "balance" prong of the free exercise test: government actions which

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<sup>23/</sup> Inquiries concerning the degree of impairment to the integrity of a particular sacred site or the importance of rituals associated with that site are only legitimate to assess whether the government interest is compelling as compared to the religious interest implicated, i.e., for balancing purposes. See discussion, infra. Such inquiries are not legitimate or supportable from a precedential standpoint if used solely as a threshold device to deny Indian religious claims.

burden the exercise of religion must be "necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner." Pet. App. 6a-7a, citing Yoder, supra, 406 U.S. at 214-15; and Sherbert, supra, 374 U.S. at 403-09. The court found the Forest Service interests in the G-O Road insufficient to override the Indians' claims. Pet. App. 8a-11a.

And just as it did with the "burden" issue discussed in Sections I and II, supra, the government attempts to wriggle free from the factual underpinnings of the case by urging the adoption of a new standard of governmental interest, under the guise of considering "how the compelling interest standard applies in this context." Gov. Br. 37.

Due consideration for the proper exercise of this important governmental responsibility requires that the balance between government and individual interests be struck somewhat



differently with respect to the government's authority to control the physical development of its land, such as the claim asserted by respondents here. A showing of the reasonableness of the government action should be sufficient to justify a land management decision that is subject to scrutiny under the Free Exercise Clause.

Gov. Br. 18. (emphasis added)<sup>24/</sup>.

The government tried this same strategy in Bowen, by claiming its interests must be elevated to consider the "programmatic" needs of the bureaucracy in preventing fraud and enhancing the administrative efficiency of Social Security Act programs. But, to the extent that aspect of the Bowen case was not moot, five Justices rejected the government's argument.

This Court's opinions have never turned on so slender a reed as

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<sup>24/</sup> Indeed, the government argues the decision to build the road is "eminently reasonable," citing improved recreational access, increased competition for timber contracts, and improved administrative efficiency. Gov. Br. 37. This is little more than a transparent attempt to relitigate adverse factual findings the government refuses to accept.

whether the challenged requirement is merely a "reasonable means of promoting a legitimate public interest." . . . The Court must [not] give overriding weight to the unanchored anxieties of the welfare bureaucracy.

Bowen, supra, 90 L.Ed.2d at 764.<sup>25/</sup> Lest the Court be inclined to give more weight to those "unanchored anxieties" in this case, it should once again reject the government's sweeping claims concerning deference to federal land management practices and focus instead on the narrow question concerning the need to construct the G-O Road.

Important constitutional principles and policy implications underlie the traditional compelling state interest--least restrictive means test. The First Amendment is recognized as a guarantor of the rights of individual religious freedom

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<sup>25/</sup> The "reasonableness" test, nearly given a breath of life in Part III of Chief Justice Burger's opinion in Bowen, was resoundingly rejected in the recent decision in Hobbie, supra, 94 L.Ed.2d at 198.

from government abuse. Reducing the standard from "strict scrutiny," Hobbie, supra, 94 L.Ed.2d at 198, to one of "reasonableness" only threatens to further skew the judicial analysis of minority free exercise claims. Amici believe this is especially problematic for Indian religion, where, as discussed above, courts have demonstrated an antipathy toward claims to sacred sites on public lands.<sup>26/</sup>

Inflating the governmental interest to a high level of generality, while at the same time lowering the legal threshold to one of "reasonableness," virtually ensures judicial deference to and places Indian religion at the mercy of bureaucratic excess and arrogance.<sup>27/</sup>

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<sup>26/</sup> This protection is especially important in the case of minority faiths: "The smaller the minority, the more likely the majority will inadvertently impose on its religious interests, . . ." Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U. L. Rev. 299, 314 (1986).

<sup>27/</sup> See Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755 (1963).

The government also ignores the effect the adoption of a reasonableness test would have on the "least restrictive means" requirement. Native Americans represent a comparatively small group in this country, whose traditional religious beliefs some would consider extremely unorthodox. Thus, the potential to subordinate their interests to the force of the federal bureaucracy involved in this case is great. The first amendment, however, prohibits governmental actions unless necessary to fulfill an interest of the "highest order" that cannot be met in a less restrictive manner. For this reason the "least restrictive means inquiry" is considered to be the "critical aspect" of the free exercise analysis. Callahan v. Woods, 736 F.2d 1269, 1274 (9th Cir. 1984).

If a law is found to be reasonable, then the question of its importance is raised. The importance of a law should be measured not by all the benefits it confers on society, but by the

incremental benefit of applying it to those with religious scruples. Its importance, in other words, should be the cost of resorting to a nonrestrictive or less restrictive alternative by exempting from the law's coverage those conscientiously opposed to the law. Regulating conduct in some way other than the legislature has chosen usually involves some degree of cost, at least potentially, to the efficiency of any regulatory scheme.

Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 331 (1969).

The government here would have the Court abandon the application of the least restrictive means inquiry, forsaking the case-by-case determination in favor of one which defers to the weighty interests of the bureaucracy because it could not, as a factual matter, meet the traditional free exercise standard. Such an approach reduces the test to idle verbage and strips Indian religious beliefs of constitutional protection. As a matter of constitutional necessity a case-by-case analysis must be

used to determine whether the means by which government pursues its interests are the least restrictive on Indian religious beliefs and practices.

It should be emphasized that this approach does not contravene the holding in Bowen relating to whether individual beliefs could dictate how the Government "itself" behaved. That holding concerned the government's assignment and use of a Social Security number for its own administrative purposes. Unlike that situation, the present case presents circumstances where government land management decisions have clear, profound external impacts on the belief and practice of Indian religion. The Ninth Circuit agreed with this distinction. Pet. App. 7a-11a.

Moreover, the Court in other religious contexts has repeatedly carved out exceptions for members of religious faiths



and measured the government's interest at the margin; i.e., by measuring the cost of creating the exception. The same doctrinal approach works in the context of Indian sacred site claims.

General rules governing federal land management need not be changed. In that sense, the Bowen Court's refusal to require the government to tailor its general operations to the religious beliefs of particular beliefs is not abridged. However, as in Sherbert, Yoder, and Thomas, claimants are merely asking that exceptions to these general rules be made to accommodate their free exercise of religion. Federal land management practices should yield to the religious claims of Indian litigants with respect to geographic areas where Indians can meet their burden of proof under a correctly phrased and applied burden prong, and where the least restrictive means of achieving

government interests, at the margin, are not compelling.

The government's interest in constructing G-O Road is minimal. In 1984 Congress enacted the California Wilderness Act, Pub. L. No. 98-425, 98 Stat. 1619. As a result of this Act, the issue is no longer one of the constitutional right of these Indians to limit the government's management authority over 25 square miles of land in the Six Rivers National Forest. Most of that 25 square miles of land, as the government recognizes, has been designated by Congress as wilderness. Gov. Br. p. 11.<sup>28/</sup> The wilderness designation

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<sup>28/</sup> Congress set the area aside as wilderness in part because of the recognition that it is "of critical importance to Native Americans for cultural and religious purposes." H.R. Rep. 98-40, 98th Cong. 1st Sess. 32 (1983); S. Rep. 98-582, 98th Cong., 2d Sess. 28-29 (1984). Only a narrow strip of land, 1,200 foot-wide, has been excluded from designation as wilderness "to enable the completion  
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will prohibit most of the commercial timber harvesting, which will have a major negative effect on the government's perceived need for completing the road. J.A. 106-09.<sup>29/</sup> Any attempt by the government to inflate their interests should therefore be rejected. The Court should focus its inquiry exclusively on the narrow claims concerning the need to build the Go-Road.

The risk of adopting the government's approach of inflating its interests has

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<sup>28/</sup> -Continued-

of the Gasquet-Orleans [G-O] Road project if the responsible authorities so decide." Gov. Br. p. 11, quoting S. Rep. 98-582, 98th Cong., 2d Sess. 29 (1984); see also H.R. Rep. 98-40, 98th Cong. 1st Sess. 32 (1983).

<sup>29/</sup> Commercial timber cutting and hauling had provided the Forest Service's major economic justification for road development. The district court, even before wilderness designation, found the government interest specious and insufficient to outweigh the Indians' free exercise rights. In light of the wilderness designation these narrow interests are further reduced in importance.

clearly been recognized by this Court before:

[T]he impact of the [governmental action] . . . It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, [the government action] carries with it a very real threat of undermining the . . . community and religious practices as they exist today; they must either abandon belief. . . or be forced to migrate to some other and more tolerant region.

Wisconsin v. Yoder, supra, 406 U.S. at 218;

cf. Engel v. Vitale, 370 U.S. 421, 431

(1962). And never before has the risk been stated so eloquently in the context of Native American religious beliefs than by the California Supreme Court in Woody:

We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-

expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

Woody, supra, 394 P.2d. at 821-22.

#### IV.

CONGRESS HAS THE AUTHORITY TO INFORM CONSTITUTIONAL ANALYSIS AND HAS EXERCISED THAT AUTHORITY CONCERNING INDIAN FREE EXERCISE RIGHTS THROUGH THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

A. Through AIRFA Congress Exercised Its Authority To Inform Constitutional Analysis.

Enacted in 1978, the American Indian Religious Freedom Act ("AIRFA"), supra, protects and preserves for Indians "their inherent right of freedom to believe, express, and exercise [their] traditional religions, . . . including, but not limited to, access to [sacred] sites, . . .". 42 U.S.C. §1996. AIRFA is a statement of

fundamental federal policy; a sacred commitment to Indian people to respect their religious beliefs and practices. Through AIRFA, Congress made a number of legislative fact-findings relevant to the present case:

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;  
. . . .

92 Stat. 469-70.

The Court has established in other contexts the principle that Congress may



enact a remedial statute, based on legislative fact-finding, that enforces rights already guaranteed under the Constitution. Katzenbach v. Morgan, 384 U.S. 641 (1966).<sup>30/</sup> The Court reaffirmed Congress' power to inform constitutional analysis in Fullilove v. Klutznick, 448 U.S. 448 (1980).<sup>31/</sup>

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<sup>30/</sup> In Katzenbach, the Court upheld the constitutionality of a federal statute, which prohibited the use of certain state literacy tests for voter eligibility, as a valid exercise of Congress' power under section 5 of the fourteenth amendment to the Constitution. The Court viewed the statute to have remedial purposes: to secure for Puerto Ricans in New York "nondiscriminatory treatment by government." Id. at 652. Congress, it said, had attempted to eliminate what it saw as "invidious discrimination in establishing voter qualifications," on the basis of its "specially informed legislative competence." Id. at 654-56.

See generally, Note, The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion, 71 Iowa L. Rev. 869, 873-877 (1986) (herein "Note").

<sup>31/</sup> In Fullilove Congress had enacted a statute which required a ten percent set-aside of federal funds granted for  
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AIRFA is thus akin to the federal remedial statutes at issue in Katzenbach, and Fullilove. It represents congressional findings that identify, but do not limit, the kinds of Indian religious activities which are to be protected under the first amendment. AIRFA's legislative history reveals Congress, as a result of its fact-finding efforts, was keenly aware of the government's historical insensitivity to

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<sup>31/</sup> -Continued-

local public works projects to be used to procure services or supplies from businesses owned or controlled by members of minority groups. Id. at 454. The Court found that Congress had the right to take appropriately tailored measures to remedy the effects of past discriminations; Congress had found that discrimination was prevalent in the construction industry and that past attempted remedies were inadequate. Id. at 459. Cf. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Note, supra, p. 876. The Court's opinion stressed the need for courts to defer to Congress' judgment on factual matters. Id. at 490-92.

Justice White, in his concurrence in Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972), applied this same principle outside the context of the fourteenth amendment.

Indians, and to the essential connection between Indian religion and sacred geography. The scope of constitutional rights identified by Congress through AIRFA necessarily includes preserving and protecting access to and use of sacred sites which are the sine qua non of Indian religious doctrine and practice. See 42 U.S.C. §1996.<sup>32/</sup>

Because Congress in AIRFA described Indian access to (and, presumably, use of) sacred sites as an inherent right, the claim presented by the Indians in the case at bar should be viewed as presumptively meeting the "burden" prong of the free exercise test. In other words, courts should presume a weightiness of these claims in light of the express provisions

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<sup>32/</sup> The Court in Bowen stated that AIRFA--"with its emphasis on the freedom to believe, express, and exercise a religion--accurately identifies the mission of the Free Exercise Clause itself." Bowen, supra, 90 L.Ed.2d at 745.

of AIRFA, and in light of its remedial purposes.<sup>33/</sup>

As discussed in Section II, supra, various courts' interpretation of the free exercise analysis in Indian sacred site cases has been inconsistent, engendering only further criticism of the analysis. The above characterization and use of AIRFA would provide courts with the framework to ensure consistency in assessing Indian free exercise claims and a context within which to understand these claims.<sup>34/</sup> It would also overcome the criticisms of "covert balancing" and "ethnocentrism" discussed earlier.

**B. AIRFA Imposes Substantive, Not Merely Procedural, Requirements On Federal Agencies**

AIRFA is a remedial federal statute. In practical terms it requires a change

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<sup>33/</sup> Note, supra, p. 885.

<sup>34/</sup> Note, id. at 884.

both in the process and substance of federal agency land management decisions which impermissibly violate Indian religion. The present case is a "textbook" example of how one federal agency, the Forest Service, attempted to emasculate AIRFA by pro forma compliance with its procedural requirements. AIRFA represents at best a cruel joke for Indian people if the decisions of federal agencies are insulated from review by federal courts under traditional principles of constitutional law.

The government attempts to obfuscate the real facts of the present case by describing its treatment of the Indians' claims as a "textbook example of such sensitive government decision making." Gov. Br. 17, 36. In point of fact, since 1976, the Indians here have had to file a number of legal challenges to protect the religious and cultural values of the high

country to which the Forest Service repeatedly turned a deaf ear. J.A. 5-66.<sup>35/</sup>

Indeed, the final Forest Service decision contravened the recommendations of its own experts. The Theodoratus Report, commissioned in 1977, and based in large part of the primary testimony of Indian people, concluded that construction of the road on any of the proposed routes will create a "direct impact upon this sacred region." J.A. 193. Theodoratus recommended that the road not be built.<sup>36/</sup>

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<sup>35/</sup> For a more recent example of outright discrimination by the Forest Service of Indian cultural and religious needs, see United States v. Means, 627 F.Supp. 247, final order issued January 12, 1987, (D.S.D. 1987), appeal pendg., No. 87-51185 SD (8th Cir.). In Means, the Forest Service had denied the Indians' application for a special use permit to set up a religious camp, despite the existence of several Judeo-Christian church camps in the Black Hills National Forest. See 627 F. Supp. at 267. The district court set aside the denial of the application on first amendment and other grounds.

<sup>36/</sup> The Blue Creek area [should] remain, in its entirety, a pristine area, . . . The nature of  
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Such administrative arrogance can hardly be characterized as a "textbook example of such sensitive government decision making." Unless and until AIRFA impacts the procedure and substance of federal agency land management decisions, these abuses will continue.<sup>37/</sup> The federal government, upon whom Indian

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<sup>36/</sup> -Continued-

the. . . Indian perceptions of the high country and. . . their specific beliefs and practices make mitigation of the impact of construction of any of the proposed routes (1-9) impossible." J.A. 194-5 (emphasis added). The Advisory Council on Historic Preservation vehemently opposed the project on grounds essentially the same as those identified by Theodoratus. See J.A. 201-5.

The Forest Service's review concluded the Theodoratus Report was "well done and of high methodological/theoretical quality", and that none of the few flaws found "affect the conclusions of the report," or its "otherwise sound and professional analysis." J.A. 199.

<sup>37/</sup> This is not an isolated example of Forest Service arrogance.

The Court further finds that Forest Service policies as implemented by Mr.

Mathers--including his decision to deny

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people look as a trustee held to the highest fiduciary standards,<sup>38/</sup> must be held accountable for such abuse.

### CONCLUSION

For the above reasons, the decision of the Ninth Circuit should be allowed to stand but should be corrected to conform to this Court's existing free exercise precedent.

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<sup>37/</sup> -Continued-

the special use application--have the effect of discriminating against Indians who are trying to practice their religion. The Court further finds that Mr. Mathers is subconsciously biased against Indian applicants and that Forest Service policy is skewed such that it discriminates against Indian applicants. He acknowledges that Indian people should be treated equally . . . but just cannot bring himself to see that that happens.

Means, supra, 627 F. Supp. at 269.

<sup>38/</sup> See, e.g., Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (administrative officials held to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards").

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PROTECTION OF AMERICAN INDIAN  
SACRED GEOGRAPHY: TOWARD A FUNCTIONAL  
UNDERSTANDING OF INDIAN RELIGION  
FOCUSING ON A PROTECTIVE  
STANDARD OF INTEGRITY

by

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APPENDIX A

## Introduction

Robert S. Michaelson (1986) has reviewed many of the recent cases brought by American Indian groups to protect various aspects of their religious belief and practice, especially their access to geographical sites and areas that are sacred to them. In concluding his review, he states:

Indeed, the time is at hand, if not past, for the development of concerted strategies for the protection of American Indian first amendment rights generally, and more specifically, the protection of those rights in connection with sacred sites (Michaelson 1986:76).

Elsewhere in the same review, Michaelson concludes that the most significant losses of religious freedom for American Indian claimants so far have occurred in connection with protection of and access to sacred sites (p. 53).

He notes that adoption by the courts of the centrality standard (ultimately stemming from the Yoder and Sequoyah cases) has placed a heavy burden on American Indian litigants

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- \* I wish to express my appreciation to Dr. Raoul Birnbaum for his many valuable suggestions in developing this paper. I also wish to express my appreciation to the many American Indian religious leaders who have patiently endured my persistence in exploring subjects they believe most human beings should already understand.



(p. 57), and that such litigation of centrality is difficult and can bring unexpected, negative results. He likens these trials to mine fields (p. 61). In this paper, I shall review major distinguishing features of American Indian religious practice and propose an alternative standard of integrity through which to seek better protection for American Indian sacred geography. While certain cases indicate that it is possible to use the centrality standard in gaining first amendment protection for a few examples of American Indian sacred geography, the centrality standard is too strict to protect many others. Clearly sacred geography is a universal and essential feature of the practice of American Indian religions. Without continuing access to many sacred sites which maintain their physical integrity, most practitioners of traditional American Indian religions will be denied the opportunity to practice many vital ceremonies.

I have spent the last thirty years exploring the traditional religious life of the hunting cultures of the Northern Rockies, including portions of Oregon, Washington, Idaho, Montana, the Dakotas, Wyoming, British Columbia, and neighboring Alberta. The attached bibliography of research on relevant aspects of American Indian religions and sacred geography from northwestern North America is the focus for much of this paper. Such research has also helped guide my field inquiries and subsequent interpretations. There is an ongoing, widespread revitalization of such traditional and non-Christian religions taking place among American Indians of the United States and Canada, which began in the 1930's. Its legitimacy and validity is unquestioned. It cannot occur, however, without recognition by the social, economic, and

legal institutions of the United States. Those institutions must take account of and accommodate the needs of Indian religious practitioners in ways which preserve the integrity of both religious practice and sacred geography essential to that practice.

### Hunting and Agricultural Religions

Although this paper discusses primarily religions of hunting groups (so called archaic religions) in Native America, not all American Indian religions are of purely hunting peoples. For example, in the Southwest, Southeast, and in the Mississippi Valley and its tributaries, religious influences stemming ultimately from Mexico and Meso-America are also found. They bear a close connection to the religious beliefs and practices of pre-European Mexico in their emphasis on an economic communalism or collectivism that is rationalized by a complex religious life that stressed collective dependence on fertility, rain, and related spirits and gods. The introduction of corn, beans, and squash had profound consequences, for it changed the basic cultural orientation of many groups. There were many dimensions to this change, including a concentration of populations in sedentary villages, a preoccupation with sowing, planting, and harvesting, an enhanced economic importance for women (from food collectors to food producers), and new forms of matrilineal social organization. Typical of these agricultural religions were concern for crops and fertility, the rise of priestly organizations, the creation of temples and shrines, and the appearance of new deities to represent such vital plants as corn, beans, and squash, or the rain and seasons. Rituals, in turn, grew more complex. Nevertheless, nowhere did agriculture entirely supplant hunting, because the rituals encouraging the growth of corn, beans, and squash remained

basically the same as the rituals of thanksgiving for fish and game animals. Such religions are led by specialists who have the attributes of true priests, including their various types which often play a prominent role in the political and other social affairs of the group. Despite these changes, sacred geography continues to be a vital part of ceremonial life in the agricultural groups of Native America.

From my own field work and a review of the available research, I believe it is possible to describe such traditional religions in terms of a number of core features, which include:

- (1) A body of mythic accounts explaining cultural origins and cultural development as distinctive peoples.
- (2) A special sense of the sacred that is centered in natural time and natural geography.
- (3) A set of critical and calendrical rituals that give social form and expression to religious beliefs and permit the groups and their members to experience their mythology.
- (4) A group of individuals normally described as Shamans (Medicine Men and Medicine Women) who teach and lead group(s) in the conduct of their ritual life.
- (5) A set of prescriptive and proscriptive (ethical) guidelines establishing appropriate behavior associated with the sacred.
- (6) A means of communicating (dreams and visions) with sacred spirits and forces.

- (7) A belief in dreams and visions as the principal sources of religious knowledge.
- (8) A belief that harmony must be maintained with the sacred through the satisfactory conduct of rituals and adherence to sacred prescriptions and proscriptions.
- (9) A belief that while all aspects of nature and culture are potentially sacred, there are certain times and geographical locations which together possess great sacredness.
- (10) The major goal of religious life is gaining the spiritual power and understanding necessary for a successful life, by entering into the sacred at certain sacred time/places.

The more archaic or hunting groups possess what is commonly regarded as a more ancient set of religious beliefs and practices. For example:

- (1) In their religious life, hunting tribes are not very hierarchically organized; nor do they favor tightly constructed hierarchical mythologies or religious philosophies.
- (2) Hunting tribes in Native America do not seem to rely on pilgrimage routes along networks of shrines to a central point, such as Jerusalem. They do not commemorate the lives of great prophets or saints in the manner of the so-called world religions.
- (3) The sacred sites of hunting tribes are not so confined or precisely located as they are among agricultural tribes in either the New or Old World; such sacred



sites are more numerous, more diverse, and less geometrically patterned than is seen among agricultural religions.

- (4) Mountains and other points of geographical sacredness are not commonly in the center of cultic developments as is so frequently seen in the Old World or in Meso-America. Nor are mountains identified so frequently with the state or with society as in Meso-America and the Old World.
- (5) Generally, hunting tribes in Native America seek the intrinsic sacredness of nature and do not force their notions of sacredness onto the land in the manner of the pyramid builders and temple builders that we see in agricultural religions of both the Old and New World; this difference I have described as a reactive approach to sacred geography, rather than a proactive approach typical of agricultural religions.

### The Sacred

In order to understand the religious conceptions of American Indians, it is first necessary to examine their ideas concerning the sacred. Durkheim (1915) has defined the sacred as follows:

A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden -- beliefs and practices which unite into one single moral community called a Church, all those adhere to them (Durkheim 1915).

It is generally agreed among scholars that all known religious beliefs, whether

simple or complex, possess some sense of the sacred, although American Indian notions of the sacred may diverge somewhat from Durkheim's definition given above. This division of the world into two domains, the one containing all that is sacred, the other all that is profane, is a distinctive trait of most religious traditions.

Among American Indians the sacred is more founded on the idea that it is an embedded attribute of all phenomena. For example, among the Lakota this attribute is wakan, whereas among the Algonkians it is manitou. Accessing this sacred attribute is a major ritual goal found in all American Indian cultures and entails actually entering sacredness, rather than merely praying to it or propitiating it. Whereas Judeo-Christian religions tend to arbitrarily create their own sacred space and times by special rituals of sacralization, American Indians attempt to discover "access points" or "portals" to the sacred that are often impossible to know before the dreams or visions that reveal them. Despite this, there are underlying regularities concerning where such access points to the sacred are most often located.

These access points to the sacred in American Indian religious beliefs and practices have received relatively little attention by scholars. As noted above, they are not only points in space, but also points in time, best described as sacred "time/spaces." For example, especially sacred times are at dawn, at dusk, and during the equinoxes and solstices. Given this, certain geographical spaces or points may be used rarely but can still be very valuable at appropriate times. It is in such "time/spaces" where entry into the sacred is most common, although not guaranteed.



It is believed that the ultimate control of this process is in the hands of the spirits who must decide if the supplicant or petitioner is worthy of admission to the sacred.

### Spiritual Beings

In addition to being divided into agricultural and hunting religions, American Indian religions are distinguished by a strong dependence on visions, dreams, and a very exacting and demanding ceremonialism, all of which are concerned primarily with communicating with various spirits and maintaining the natural and cultural orders. In many tribes, prayers are directed to a collectivity of divine or spiritual beings, as in the pipe ceremony of the Plains tribes. Belief in a supreme being is apparent among most groups, but the connection of a supreme being with creation is often minimized by the fact that in mythology there is another supernatural being, the culture hero, who is invested with creative powers. This hero's true mission is to deliver cultural institutions, including religious ceremonies, to human beings. Trickster tales occupy a major part of Native American mythologies. The tales usually portray the culture hero/trickster as an animal such as Coyote on the western Plains, in the Basin, the Plateau, and California. There are numerous other beings in the sacred world, varying from tribe to tribe.

Hunting tribes generally (but not in all cases) believe the dead are in the sky or somewhere beyond the horizon, but they are believed to play a continuing role in the lives of the living. Agriculturists may believe that the dead are in the ground, or at the place of emergence of mankind. In stratified agricultural societies like those

of the Mississippian culture, there are different abodes for different social categories of the dead. At the same time, there is everywhere in Native America belief in ghosts on earth, who can be heard whistling often at night. Independent of these beliefs is the widespread idea of human reincarnation or human transformation into animals.

The most important spirits among hunting tribes are the guardian spirits acquired in fasting visions by youths of such areas as the Plateau, the Northwest Coast, California, the Plains, and the Basin. These are mostly animal spirits and appear to the person during a vision quest which consists of several days and nights of fasting and isolation at special sacred places. This spirit endows the person with a particular "medicine" (or "power"), a sacred song, sacred dance, sacred dress, and instructs him to make a pouch or medicine bag in which he keeps the sacred paraphernalia associated with his vision. "Power" often requires specific rituals as well as avoidances (e.g., food). The vision quest is basic to most American Indian hunting religions, but some of the agricultural tribes also follow this custom.

### Shamans and Priests

Both in Asia and in North America, the Shaman ("Medicine Man" or "Medicine Woman") is a visionary who has received power to cure people, but there are other types of visionaries with extraordinary powers, e.g., warrior and prophecy powers. Shamans customarily heal diseases that are ascribed to causes such as witchcraft or the breaking of a taboo. Normally the causes of disease are of two major types: a spirit or disease object is supposed to have intruded into the body, or the sick person's soul or power has been

stolen. In the former case it is the Medicine Man's task to frighten the spirit away or to remove it from the body by sucking or drawing it out. If the latter cause is involved, he has to catch the lost soul through special ritual. The Medicine Man may also sink into a trance, release his own soul, and send it out after the stolen soul.

Among hunting groups, the Medicine Man is an essential part of most ritual activity. Principally, he conducts rituals and teaches their proper form, meaning, and use. Active practice of most aspects of religion would be impossible without this person. The Medicine Man is regarded as a sacred person because of his proximity and access to sacred beings and forces. He is especially instrumental in helping others establish, maintain, and utilize their relationships with the sacred.

The life of a Medicine Man or Medicine Woman is demanding and materially unrewarding. They are in constant demand and often must travel great distances to attend to the needs of the sick. They are also called upon to help correct behavioral and interpersonal problems. Family counseling and psychotherapy for individuals are acknowledged techniques of Medicine Men who use them to deal with many psychological and behavioral problems.

Although they are not usually in positions of political leadership, Medicine Men frequently influence the selection of political leaders. Their opinion as Medicine Men frequently influence the selection of political leaders. Their support is seen as a reliable indicator of a candidate's promise as a leader. Medicine Men also are called on to serve as mediators in disputes, much as judges or magistrates are in other cultures.

Medicine Men are arbiters of custom and are the authorities who determine the authenticity of cultural practices; they sometimes prescribe the appropriate ritual dress, ritual behavior, and ritual performance for communities and their members. It is not surprising, therefore, that they are also the principal teachers in matters of religion. As religious teachers, they exercise immense influence on the young, as they gradually acquire a step-by-step familiarity with the intricacies of their religion. Because there are no written "holy books," the Medicine Man as teacher is even more important for learning and teaching the religion than would be true of priests in literate cultures. It is rare that any serious ceremony is begun without a Medicine Man officiating. Each ceremonial performance is at least partly a lesson he teaches about the religion and its meaning. Teaching and learning about religion is a person-to-person experience, and each serious participant engages in a life-long learning process.

In conducting rituals, most Medicine Men seek not only to strengthen and preserve the traditional religion, but to find new leaders who can be trained as medicine men to carry on this unwritten religious tradition. Once found, the neophyte Medicine Men are carefully guided through a series of steps of increasing complexity. Often they are guided by several senior Medicine Men of distinguished reputation developed over a period of many years. Because of their knowledge and influence, Medicine Men have often become the principal defenders of traditional culture and the beliefs and practices of traditionalists against the destructive assaults of missionaries and government agents. Medicine Men have often been the understanding mediators of cultural conflict among those



persons who suffer confusion and inner contradictions because of the frequently conflicting worlds (Indian and non-Indian) in which they have grown up.

In the agricultural religions of North America, Medicine Men (sometimes considered Priests) join together, exchanging experiences and working out a common, secret ideology; or they may form clerical societies into which neophytes are accepted after passing through a series of ritual requirements. In the Southwest, where collectivism is part of the cultural pattern, there are organizations of professional healers and ritualists who perform rituals in patterns of complex cooperation. In all areas, however, regaining the patient's health means that harmony has been restored between man and the sacred.

Other common rituals conducted by Medicine Men in Native North America include Bear Ceremonialism, the so-called Shaking Tent, the Sweat Bath, Confession, Fertility, and various Thanksgiving ceremonies. In some groups the Medicine Man performs animal ceremonialism, usually intended to appease a particular spirit, but the primary purpose of such rituals is to ensure the return of the game by showing proper respect.

#### Rituals and Sacred Geography

There is a great deal of individual diversity in vision questing among most groups. A vision quest requires that an individual directly petition the sacred for spiritual aid. This ritual most commonly requires isolation from the community for a set period of time, fasting, praying, and offerings to the sacred. Commonly, and as a result of instructions from spirits received while isolated in this manner, an individual

will make a medicine bundle. These bundles contain sacred objects, prepared as the spirits direct. Associated with these bundles will be clothing, songs, dances, and myths that are also considered part of this sacred power. Commonly most groups require that one be purified before engaging in this ritual, a process normally including fasting and the sweat bath. The sites used for vision quest rituals are among the most common forms of sacred geography in Native America. Such sites number in the thousands in the Northern Rocky Mountain region where I have conducted most of my research into this area.

Group ceremonies designed to thank and/or petition the sacred are common throughout the area, e.g., the Sun Dance, the Horse Dance, and the various animal dances. Such group rituals include elaborate multi-day preparations by organized groups of religious specialists, the building of ceremonial structures, the reciting of important sacred stories and myths, the performance of preparatory sacred rituals and dances, and the presentation of offerings to the sacred at specific sacred sites at specific sacred times. These rituals can require months of preparation to accumulate the food and other supplies needed for the participants, and entire reservation communities will cooperate in the construction of ceremonial structures located at specific sacred grounds. Such sacred structures are generally left to become sites of pilgrimage and prayer.

As already noted, most ceremonies/rituals require performance at special times, e.g. calendrical rituals, such as the spring and fall equinoxes or the winter and summer solstices. Such sacred time/places are found in a bewildering variety, but major types include the following:



- (1) Vision quest sites.
- (2) Monumental geological features that have sacred (usually mythic) meaning -- mountains, waterfalls, or unusual geological formations are frequent examples.
- (3) Rock art sites, such as pictographs and petroglyphs.
- (4) Burial areas and cemeteries.
- (5) Sites of ceremonial structures, such as medicine wheels or Sun Dance arbors.
- (6) Sweat bath sites.
- (7) Gathering areas where sacred plants, stones, and other natural materials are available.
- (8) Sites of historical significance, such as battlefields.
- (9) The point where a group is described in myth to have originated.

Following is a short list of some thirty (from my accumulating list of about 300) currently used sacred sites from the Northwestern United States that have been field-verified in my research. (In the following I have relied partly on a list compiled by Deaver, 1986.):

- (1) Eagle Nest Butte. This is a prominent topographic feature of the northeastern part of the Pine Ridge Reservation in South Dakota. It may have been used traditionally as a site for eagle-trapping. Today it is used for vision questing, memorial, and other rituals (Hassrick 1965:233 and Powers 1982:92-93).

- (2) Buzzard Butte. This site is near Eagle Nest Butte, and is used for vision questing (Powers 1982:92), memorial, and other rituals.
- (3) Saddle Butte. This is also near Eagle Nest Butte, and is used for vision questing (Powers 1982:92), memorial, and other rituals.
- (4) Snake Butte. This is also near Eagle Nest Butte, and is used for vision questing (Powers 1982:92), memorial, and other rituals.
- (5) Black Hills. These are located in South Dakota. Their various mountain tops are favored for vision quests (Feraca 1963:25). The Black Hills are used for virtually all types of rituals, including the Sun Dance.
- (6) Bear Butte. This is a very sacred site, used today by Lakota and various other tribes (some coming from hundreds of miles away) for vision questing (Parks and Wedel 1985:169), memorial, and other ceremonies.
- (7) Paha Wakan (Sacred Hill). This prominent hill is two miles southwest of present Blunt, South Dakota, a traditional vision questing and ritual site (Howard 1972:293). A snake effigy has been reported in this location (Howard 1972:293), suggesting Mississippian cultural affinities.
- (8) Paha Wakan (Sacred Hill). This is another sacred hill near Reliance, South Dakota (Howard 1972:293), widely used by the Lakota and certain other Plains tribes for vision questing and other rituals.

- (9) Paha Wakan (Sacred Hill). This is yet another sacred hill near Redfield, South Dakota, and is a site for vision questing and other rituals (Howard 1972:295).
- (10) Wanaqi-Kaga. This is located east of Choteau Creek along the Missouri River. It is known to the Lakota as "Imitates-a-Ghost" for a Yankton shaman who lived near there (Howard 1972:295).
- (11) Mounds. These are near Fisher's Grove State Park, just west of Frankfort, South Dakota, and are used for vision quests, memorial, and other rituals (Howard 1972:298).
- (12) Turtle River Oracle. This was located near the mouth of the sacred Turtle River (Howard 1972:299). A boulder could communicate knowledge of the future to those who interpreted its movement; it was removed in 1892 (Howard 1972:299-300) and its present location is a secret.
- (13) Bede Wakan. This first sacred lake is Lake Madison, and its name is derived from a phosphorescent light that appears there at night (Howard 1972:301).
- (14) Bede Wakan. This second sacred lake is Spirit Lake, located north of DeSmet, South Dakota. The calamus root, a sacred root, is dug near this lake (Howard 1972:302).
- (15) Bede Wakan. This third sacred lake is located east of the Fort Peck Reservation in Montana. It is sacred in part because curative herbs and roots grow around its shores.

- (16) Custer Battlefield. This is one of many battlefields where many died in Montana; it is the locus of memorial and other ceremonies conducted by descendants of the warriors who participated in this battle.
- (17) Wounded Knee Battlefield. This battlefield is similar to the Custer Battlefield in Montana, and is used in the same manner. Other well known Cheyenne battlefields are Summit Springs and Sand Creek, Colorado.
- (18) Deer Medicine Rocks. This is a pictograph site where Sitting Bull is believed to have had a vision, foretelling the outcome of the battle of the Little Big Horn (De Mallie 1982, Badhorse 1979, Niehardt 1961). Hundreds of pictograph and petroglyph sites dot the landscape of the Northern Plains and are used primarily for vision quests.
- (19) Medicine Rock. This is on the edge of the Northern Cheyenne Reservation in Montana. It is a site for Sun Dances, including the last one held before the the Battle of the Little Big Horn (Badhorse 1979:27).
- (20) Big Horn Medicine Wheel. Like Bear Butte, this is one of the most sacred sites in the Northern Plains and is used by many tribes, some from great distances. Many different kinds of rituals are conducted here.
- (21) Cave Hills. This South Dakota site is a pictograph site, sacred to both the Cheyenne (Parks and Wedel 1985:171) and the Lakota.



- 22) Sleeping Buffalo Monument. This Montana site is identified with a well known myth and is used as a memorial site and may be used as a vision quest site.
- 23) Kootenai Falls. This Idaho site is a critical sacred site on which the entire Kootenai religious system is founded. Various other falls in this region are sacred to the Kootenai and other tribes.
- 24) Elmo Pictographs. This Montana site is a Kootenai and Flathead vision quest site. There are hundreds of such sites in Western Montana and neighboring Idaho and Wyoming.
- 25) Chicago Peaks. This site is sacred to the Kootenai of Idaho and Montana.
- 26) Pilot Knob. This Nez Perce vision quest site is also used for other rituals; it is very old, like Kootenai Falls. Like Kootenai Falls and the G.- O. Road "high country," it has been the subject of controversy between tribes and federal bureaucracies.
- 27) Wallowa Lake. This northeastern Oregon, Nez Perce vision quest and ceremonial ground was the home of Chief Joseph, whose descendants gather here to memorialize his life, death, and historical significance to the Tribe.
- 28) Celilo Falls. This former sacred fishing site near The Dalles, Oregon, now inundated, was the scene, until the 1950's of numerous intertribal ceremonies of the Northwest, especially those associated with fertility, thanksgiving, and salmon.

- (29) Mount Adams. This mountain in Washington is the site of frequent vision questing and other ceremonies identified with the Yakima, Klikitat, and other Sahaptian groups.
- (30) Mount Rainier. This mountain in Washington is the scene of various rituals conducted by Puget Sound and other tribes.

### Functions of Sacred Geography

Throughout the Northern Rocky Mountain region, American Indian religious leaders attest that the geographical location of rituals is vital. Unless rituals are performed at the proper locations, they have little or no efficacy. In a literal sense, the natural environment becomes an altar or church in these religions. Similar conceptions are recorded for other American Indian groups throughout the Northwest, Southwest, Eastern Woodlands, Subarctic, and Arctic regions of North America. It is the rule rather than the exception that American Indian ritual life is inextricably tied to the natural environment.

In reviewing some 300 sacred sites, I have noticed that all groups tend to hold sacred the boundaries between cultural life and geological zones (see a more specific typology on pp. 13-14). In addition, all groups possess a body of beliefs concerning the appropriate sacred times and rituals to be performed at such sites. It has also become apparent to me that sacred sites serve to identify fundamental symbols and patterns of American Indian cultures. They also project an image of the social order and lend concreteness to the less visible systems of human relationships. They create an



organization. These sacred symbolic systems, when superimposed on geography, give it significance and intelligibility. The more central a place is in the religious life of a group, the more numerous the symbolic representations it will possess. Sacred divisions of time are customarily marked at sacred sites by the timing of rituals performed there. Sacred sites create a conceptual and emotional parallelism between the objective order of the universe, the realm of the spirits, and the constructs of human cultures. Sacred sites are places of communication with the spirits, portals where people enter the sacred. Thus, they are a link between the world of humans and the sacred, where spiritual power can be attained. For example, according to Black Elk, when describing the sweat lodge, he described the willows as being set up in such a way that they mark the four corners of the universe. The whole lodge symbolizes the universe, and all the things of the world are contained in it. He described the round hole, which holds the heated rocks for making steam in the center of the lodge, as the center of the universe in which dwells Wakantan with his power which is the fire. Sacred sites are also natural maps that provide direction to life and shape to the world. They give order to both geographic and social space, and by ordering space they order all that exists within it.

There are yet other reasons why geography is so often sacred to American Indians. As I have noted above, points of geographical and other natural transition become access portals to the sacred. Natural and temporal discontinuities or transitions are portals; dreams and visions are access techniques used to enter the sacred through these portals. In observing these phenomena, I have been struck

by the parallelism of these ideas with those of Arnold Van Gennep and others who have demonstrated that the rites of passage in the human life cycle are also sacred transitions. In many cultures, the sacred is entered by individuals during such life cycle transitions. Broadening this focus on life cycle transitions as portals to the sacred, I have also noted the customary celebration of annual seasonal transitions as times of great sacredness in many cultures, e.g., when the sacred domain is accessed during calendrical rituals. Examples would be the "first game" and "first fruits" thanksgiving and fertility rituals surrounding equinoxes and solstices in Native America. Also well known are transitions in the lunar cycle in which the first quarter, second quarter, third quarter, and full moon are seen as parallel to a human life in birth, adolescence, marriage, and death.

A conjunction of such transitions (simultaneous occurrences) normally provides even greater opportunities for access to the sacred. For example, most Northwestern tribes view such conjunctions of transitions as especially sacred times; access to the sacred is virtually guaranteed for those conducting appropriate rituals in the appropriate places, at such times. Yet other transitions to be considered in the timing and location of rituals include dawn, noon and/or dusk, timber line, and other similar natural demarcations or transitions.

From this view, therefore, sacred sites and sacred geography function as fundamental ingredients of ritual in American Indian religions. Sites of geographical sacredness are joined with the sacredness of the seasons, the sun, the moon, the life cycle of the

individual, and the rhythm of community life, to form a complex set of sacred transitions customarily celebrated in numerous rituals.

### Centrality or Integrity

As interpreted by the courts in the cases referenced by Michaelson (1986) above, "central" has a meaning best described as indispensable, essential, or requisite. The courts have, therefore, introduced a very high standard that must be met for first amendment protection of American Indian sacred geography. Under this interpretation of central, preservation of a specific sacred site can only be achieved if it is deemed to be essential, indispensable, or requisite for the practice of a particular tribal religion. In its applications, this standard goes well beyond the meaning of "infringement" and borders on "extinction." In other words, to receive first amendment protection, American Indians must demonstrate that a change will not merely infringe but virtually destroy a religious practice or belief. Judgments by courts as to centrality, therefore, are being made in terms of a standard of survival/extinction.

It is possible, I think, to construct an alternative standard which not only protects American Indian religious practice, but which does so before the brink of extinction is reached. Such a standard is also consistent with scholarly standards concerning what is essential for the practice of American Indian religions. Clearly, this alternative standard protects rather than sanctions the destruction of religions.

Integrity is proposed here as an alternative standard, because it refers to "the quality or state of being complete and undivided," or simply to "customary practice." Infringement then can be understood as a forced or undesired change in the customary practice of a religion. Under the present centrality standard, infringement is not reached until the very existence or continued survival of the religion is threatened; even at this point it is still not clear exactly what centrality means. A desirable feature of a standard of integrity is that it is more open to factual investigation than a standard of centrality. Determination of whether the integrity of a religious practice has been violated would rest on answers to factual questions.

Among the factual questions that could be raised concerning whether the integrity of a religion has been violated, the most important is whether its customary functioning has been altered. For example, if the normal requirements or conditions necessary for the performance of customary rituals are changed so the performance is prevented, then the integrity of the religion has clearly been infringed. Alternatively, if this happened, are there functional alternatives? If not, then the integrity has not only been infringed, but permanently.

Anthropologists and other scholars of American Indian religions rarely, if ever, describe the practice of religions in terms of the relative necessity of particular rituals. Instead, such descriptions normally include all aspects of the religion without interpretation or evaluation of this kind. More often, religions in all their complexity and detail are viewed functionally. No part is seen to be unnecessary; otherwise, it would



not be part of the religion in the first place. Given this, how may a standard of integrity be applied when specific parts of a religion are threatened by change? Possible factual questions would be:

- (1) is the affected practice held by members of the group to be an essential part of their religion? Or,
- (2) are there alternatives to the affected practice acceptable to members of the group? Or,
- (3) would removal or alteration of the affected practice impair or prevent other essential practices of the religion?

The alternative to a standard of integrity is to continue having the courts make dubious judgments about centrality. There are few factual inquiries or other research procedures that can provide unambiguous answers to questions of the relative centrality of religious practices. Most questions of centrality are not subject to factual inquiry. The only possible factual inquiries center on what changes would destroy a religion. Obviously infringement is more effectively investigated from a perspective of integrity. I suggest that the courts employ this standard rather than the standard of centrality, which has been too limiting in providing protection for American Indian sacred geography.

#### Integrity and Sacred Geography

The integrity of religious practice in American Indian religions also entails consideration of sacred sites and sacred geography. In the preceding, I have

demonstrated that sacred sites and sacred geography are a fundamental ingredient of rituals. This finding is widely supported by the research literature I have consulted and by the field research I have conducted.

A task remaining in this paper is to clarify the relations between a standard of integrity and the protection of American Indian sacred geography. Above, I have suggested several factual questions that may be raised concerning whether integrity has been violated or infringed. Among them are the three possible questions raised on page 25 above.

In answering the first question, one must factually determine if a sacred site or space is held to be essential for the performance of rituals. In answering the second question, one must factually determine if there are acceptable alternatives to a sacred site or space. In answering the third question, one must factually determine if destruction or alteration of a sacred site or space will prevent other essential practices of the religion. Answers to these questions then provide the courts with not only a means of determining whether infringements of practice will occur, but also to what degree such infringements may impact other practices of the religion.

One of the most difficult factual questions to answer is the geographical extent of sacred sites and spaces. I would argue that a standard of integrity is a feasible and practical means of gaining factual answers to this question. In order to do so, however, one must understand that its context is a vital part of a sacred site. Context may include the relative remoteness of a sacred site from settlements and other disturbances,



as well as positioning relative to one or more of the cardinal directions. For example, a common contextual requirement may be a view to the east of the first rays of dawn. Undisturbed views of other awe-inspiring scenes are frequently described as essential contexts for sacred sites. To the degree that such contexts are altered, they can erode or eliminate the ritual efficacy of sacred sites. In the words of one of my principal teachers, "The spirits may go away."

Clearly, it is possible in some examples to argue that certain sacred sites are more important than others, but criteria must be established before such rankings are valid. For example, if a particular site is the scene of several rather than one required ritual, or if it is the only site where a ritual can be performed, or if it is used by more rather than less worshippers, or if it is used by several tribes rather than one, then there are grounds to argue that it may be relatively more important, but not necessarily more dispensable than other sacred sites.

### Conclusion

In summary, decisions as to the integrity of religious practices and of sacred sites and how they may be infringed are fact-bound. My purpose here has been to suggest various means by which objective, informed decisions can be made concerning essential connections between American Indian religions and sacred geography. I believe that the judicial system can make more informed, sensitive judgments in these difficult cases by focusing their inquiries on the concept of integrity rather than centrality.

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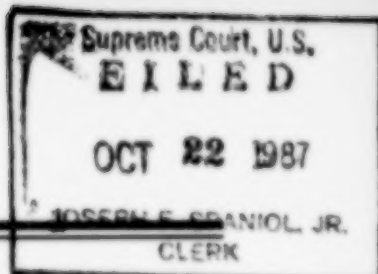
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**AMICUS CURIAE**

**BRIEF**

15  
No. 86-1013



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

RICHARD E. LYG, *et al.*,  
SECRETARY OF AGRICULTURE, *Petitioners*  
v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

BRIEF OF THE CHRISTIAN LEGAL SOCIETY,  
AMERICAN JEWISH COMMITTEE,  
AND CONCERNED WOMEN FOR AMERICA  
AS AMICI CURIAE SUPPORTING RESPONDENTS

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### QUESTIONS PRESENTED

Whether government development of public lands that are sites sacred to Native American religious practice of hundreds of years, "burdens" the rights of Native Americans to the free exercise of religion, within the meaning of the First Amendment.

Whether such a burden on Native American religious exercise is justified by a state interest sufficiently compelling to justify the infringement on religious liberty.



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AS AMICI CURIAE SUPPORTING RESPONDENTS**

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**INTEREST OF THE AMICI CURIAE**

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Chris-



tian Legal Society, founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the civil and religious rights of Jews will be secure only when the civil rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and government, which is encapsulated in both the Establishment Clause and the Free Exercise Clause. One corollary of this principle is that only when justified by the compelling interests of society may the state bar a faith group from carrying out a practice dictated by its religious beliefs. Such compelling interests, we believe, are not present in the case at bar.

Concerned Women for America (CWA) is a national non-profit women's organization that works through education, lobbying and litigation to promote religious liberty and traditional moral values. CWA, based in Washington, D.C., has over 560,000 members nationwide.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a classic question of free exercise jurisprudence: whether government may destroy or seriously undermine the religious value of sites currently used for worship by Native Americans, absent a compelling interest in the destruction. Put simply, the issue is the right of traditional site-specific religious practices to the constitutional protection already accorded to more mainstream beliefs.

The fact that this case involves Native American religions is significant: much of free exercise doctrine has been developed in cases that involved religious interests unrelated to any one situs. Site-specific worship by Native Americans is essential to the preservation of native religions. Unlike Judaism and Christianity, Native American religions generally associate spiritual power and immediacy with particular sites: worship and communication with spirits may take place *only* at those sacred sites. Destruction of a sacred site, therefore, is a cataclysmic event for a group of adherents such as respondents, whose entire religion is inextricably tied to the high country they seek to protect from development that will be disastrous to their beliefs and practices. Although suits seeking exemptions from otherwise valid regulations, such as school attendance requirements, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or compulsory flag salutes, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), involve requests for relief from infringements of beliefs that regulate behavior, such cases do not limit the ambit of the free exercise clause to "coerced" actions. Native Americans seek exemptions from development plans that infringe as deeply upon their religious way of life as school attendance laws do upon the Amish, and compulsory flag salutes upon Jehovah's Witnesses.

It is essential to recognize that as the religious context changes, the constitutional analysis must account for

the differences in theology and practice among religions. The free exercise clause mandates judicial recognition of the momentous religious interests at stake in suits, such as this one, that seek to preserve the right to meaningful worship for American Indians. This recognition requires that the legal analysis employed by the Court reflect the site-specificity of the religious claim. Once the analysis has properly accounted for the Native American religious context, the traditional free exercise balancing test applies: the government must demonstrate that a compelling state interest, carried out by the least restrictive means available under the circumstances, justifies the infringement of Native American beliefs. As the brief submitted by the Solicitor General appears to concede by its contention that a reasonableness standard should apply, the government has failed to show that it has a compelling interest in logging and paving a six-mile stretch of road in a remote wilderness area, much of which already has been protected from development by congressional action.

Further, although the theology and practice of Native American religions differs from the religious interests at stake in many free exercise cases, limitations on government control of public lands have long been recognized in the public forum doctrine. Like other forms of first amendment activity that traditionally have taken place in public fora, Native American rituals and quests have been held at sacred sites "from time out of mind." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In the classic public forum, such as the public lands at issue here, the government must demonstrate a compelling interest in development that infringes first amendment rights.

## ARGUMENT

### I. GOVERNMENT DEVELOPMENT OF SACRED SITES INFRINGES THE FREE EXERCISE RIGHTS OF NATIVE AMERICANS.

#### A. The Role of Holy Places is Fundamental to Native American Worship and Belief.

The Judeo-Christian concept of a supreme and immortal deity, belief in whom may be divorced from any specific situs, is not applicable to many Native American religions, which view gods, people and nature as an integral whole. In this view of the universe, spiritual and physical reality converge in certain natural phenomena or locations. A. Hultkrantz, *Belief and Worship in Native North America* 126 (C. Vescey ed. 1981). In many American Indian religions, therefore, transcendent reality is not immune to destructive physical forces. *See generally* Momaday, "Native American Attitudes to the Environment," in *Seeing With a Native Eye: Essays on Native American Religion* 79, 81 (W. Capps ed. 1976). In Native American belief, the place where an event occurred, rather than the event itself, assumes special spiritual significance. As a result, Native American worship focuses not so much on revelatory events or texts, but on spiritual renewal through ceremonies and individual relationships with holy places. Federal Agencies Task Force, American Indian Religious Freedom Act Report 10 (1979) ("The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must . . . be performed at the place and in the manner designated."). *See also* Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447, 1448-53 (1985); P. Matthiessen, *Indian Country* (1984).

The necessity of communicating with spirits through certain locations makes the destruction of a Native American sacred site a cataclysmic event. This emphasis on the sanctity of a particular location distinguishes Native

Americans from Jewish and Christian Americans, for whom the enforced preservation of particular sites may pose substantial free exercise problems. Cf. Note, *Land Use Regulation and the Free Exercise Clause*, 84 Colum. L. Rev. 1562 (1984). Even for Judaism and Christianity, however, some locations may be infused with such profound religious meaning and history that the preservation of such locations is of great importance to their adherents. These distant sites generally are located in the Middle East, and may seem somehow more genuinely "religious" than a Native American site in the United States. In Israel, such places and access to them are protected by the Holy Places Law. 5727-1967, 21 L.S.I. 76 (1967). See also I. Englund, *Religious Law in the Israel Legal System* 60 (1975). Indeed, the United States has stressed in its dealings with Israel that the protection of the spiritual "special interest of three great religions in the holy places of Jerusalem" is vital to its relations with Israel. 57 Department of State Bulletin 33 (1967), quoted in Jones, *The Status of Jerusalem: Some National and International Aspects*, 33 Law & Contemp. Probs. 169, 172 (1968).<sup>1</sup>

#### B. The Free Exercise Clause Protects Site-Specific Worship.

Recognition of the site-specificity of Native American religions is essential to the constitutional protection of long-standing, deeply held Indian beliefs. While free ex-

<sup>1</sup> Representative Morris Udall drew the parallel between Native American sacred sites and sites in the Middle East in a debate prior to the enactment of the American Indian Religious Freedom Act, *infra*:

For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand this? Our religions have their Jerusalems, Mt. Calvarys, Vaticans and Meccas. We hold sacred Bethel, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these sites.

124 Cong. Rec. 21,444 (1978).

ercise analysis often focuses on "acts of conscience," rather than objects of belief, see, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981), it is imperative that this Court recognize the free exercise implications of a government action that may destroy the very ability to practice a vital, on-going religion. If the state may undermine the religion itself with no constitutional protection for the Native American interests at stake, then the free exercise clause would have been limited to encompass only mainstream, monotheistic religions.<sup>2</sup> This result is surely not consistent with our con-

<sup>2</sup> The government attempts to argue that the Native American religious groups have sought "their own individualized benefit program . . ." Brief for Petitioner at 31. The same could be said of the religious individuals who sought unemployment insurance in *Sherbert*, *Thomas* and *Hobbie*: each of them sought an exemption from an otherwise valid requirement, and the result of the exemption was increased governmental costs. Such an exemption does not "amount to a request that the government subsidize their religious practices," as the government claims. More accurately, the request for an exemption from development asks government to refrain from destroying the religion of many Native worshipers. The request does not seek affirmative support for native religious practices, such as financial support for native religious practices, or free transportation to sacred sites. Virtually all exemptions granted on free exercise grounds involve increased governmental costs: from unemployment insurance payments to processing costs for conscientious objectors to military conscription, accommodations of free exercise necessitate expenditures. The mere fact that there may be some cost associated with satisfaction of free exercise requirements, therefore, does not transform an exemption into a "subsidy." Further, although we take no position here on the proper disposition of *Oregon Department of Human Resources v. Smith*, No. 86-946, it is important to distinguish this case from an arguably valid occupational qualification, which may necessitate abstention by an employee from otherwise protected religious ceremonies. We would point out, however, that it is not the alleged criminality of peyote use that is central to the analysis, since it appears certain that the employer would have objected as strenuously to celebration of the Christian eucharist with wine, as to the use of peyote in a Native American ceremony.



stitutional system, which is designed to protect the religious liberty of all Americans, whether or not their beliefs are similar to the majority. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Some district courts have been reluctant to acknowledge that a sense of spiritual immediacy and awe for places that have witnessed momentous religious events, far more profound even than that felt by many Jews and Christians only in the "Holy Land," play a fundamental role in Indian religion, and have held that the lack of a legal property interest in a sacred site on public land precludes free exercise relief. See, e.g., *Sequoyah v. TVA*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980) ("Since plaintiffs have no legal property interest in the land in question, . . . a free exercise claim is not stated here"); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (same).

Yet every Court of Appeals that has considered whether Native American sacred sites are protected by the free exercise clause, even those that have denied site-specific claims, has acknowledged that the free exercise clause is applicable to public lands. Although finding that the tribal plaintiffs had failed to show a burden on their religious practices the District of Columbia Circuit in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), specifically held that the free exercise clause may sometimes supersede government's land-management plans:

The government must manage its land in accordance with the Constitution . . . , which nowhere suggests that the Free Exercise Clause is inapplicable to government land. This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis. In holding that government land uses can never burden the right to freedom of belief, and can burden the right to freedom of prac-

tice only if site-specific religious practices are significantly impaired, we pay due regard to the government's rights and duties in its land. However, we see no basis for completely exempting government land use from the Free Exercise Clause.

708 F.2d at 744 n.5. See also *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980) ("The government must manage its property in a manner that does not offend the Constitution."); *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980) (government's ownership of public property does not preclude free exercise claim).<sup>3</sup>

As the district court in *United States v. Means*, 627 F. Supp. 247, 257 (D.S.D. 1985) said, the issue is not ownership, but the existence of a governmentally-imposed burden on religious exercise: "[The refusal by the forest service to grant a special use permit for the conduct of religious ceremonies] presents the classic First Amendment problem of whether there is a denial of the free exercise of religion when a government regulation, whose purpose is concededly nonreligious, either makes illegal, or otherwise burdens, conduct which is dictated by some religious belief." The burden on Native American religious practices in *Means*, as in this case, was caused by application of otherwise valid, neutral Forest Service regulations, in a manner that interfered with essential religious worship. Because the refusal to grant an exemption to the Native American plaintiffs in *Means* was not based on a compelling state interest, the court held

<sup>3</sup> Even Judge Beezer's partial dissent from the decision below, stressed that

It is now well settled . . . that Indians have standing to raise first amendment objections to the development of public land . . . . The district court properly concluded that the Indian plaintiffs have a first amendment interest in the high country . . . . [However], to qualify for first amendment protection, the plaintiffs' use of the high country must be "religious."

795 F.2d at 701 n.2 (Beezer, J., dissenting in part).

that the denial was an unjustified infringement of their free exercise rights.

As in *Means*, the question presented here falls squarely within the ambit of the free exercise clause. Failure to recognize the religious interest of the Native American groups that worship in the high country is tantamount to failure to protect site-specific religions. Yet the Solicitor General has proposed a test that would remove all development, no matter how drastically development would affect the religious exercises that take place at sacred sites, from free exercise clause analysis.

In an unprecedented and dangerous argument, the Solicitor General urges this Court to apply the free exercise clause only in cases that involve compulsory behavior. Because the government has not directly required or prohibited the religious practices of Native American groups at sacred sites, this argument runs, the development of the sites does not burden their religious practice. The absurdity of this argument is demonstrated by the realization that the actual *destruction* of an otherwise vital and successful religion would be insulated from all constitutional review.

Clearly, this attempted narrowing of the constitutional guarantee of religious liberty is flawed. The free exercise clause protects individuals and institutions against *burdens* placed on religion by government. See, e.g., *Wisconsin v. Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may . . . nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Cantwell v. Connecticut*, 310 U.S. at 304 ("In every case the power to regulate must be exercised so as not, in attaining a permissible end, to unduly infringe the protected freedom."). The fact that infringements of religious exercise often take the form of compelled behavior that violates religious belief, e.g., *West Virginia Bd. of Educ. v. Barnette*,

*supra* (compulsory flag-salute), does not reduce the ambit of the free exercise clause to a mere protection against compulsory or prohibited behavior, as the government repeatedly argues. In *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), for example, the Court invalidated a New York law that altered the governing structure of the Russian Orthodox Church as an infringement of free exercise. In dissent, Justice Jackson made the same argument that the government attempts here:

[New York state] has only held that this cleric may not have a particular Cathedral, which, under New York law, belongs to others. It has not interfered with his or anyone's exercise of his religion. New York has not outlawed the Soviet-controlled sect nor forbidden it to exercise its authority or teach its dogma . . . .

344 U.S. at 130 (Jackson, J., dissenting).

But the free exercise clause, contrary to Justice Jackson's position, protects against infringements of religion by government, rather than against only one form of burden, that of coercion. Thus, while the existence of regulations that require (or prohibit) behavior that is contrary to (or mandated by) religious beliefs certainly states a free exercise claim, it does not encompass all possible free exercise interests protected by the Constitution.

Stated differently, the interference with religious exercise contemplated by the government here constitutes the same degree of indirect, yet powerful, pressure to conform that was involved in *Sherbert*, *Thomas* and *Hobbie*. In those cases, unemployment compensation was conditioned on behavior that was inconsistent with fundamental religious beliefs. Individual citizens were put to the choice of abandoning their beliefs or foregoing government benefits. In the case of destruction or impairment of sacred sites, an entire body of religious adherents is



forced to alter drastically their religious practices, or to forego their religious exercise altogether.

In either case, government has burdened significantly religious worship, thereby violating the free exercise rights of religious individuals, unless a compelling state interest justifies the infringement. The fact that a sacred site, rather than sabbatarian observance, is the object of the burden, merely highlights religious plurality of the American people. It does not affect the existence of a constitutionally cognizable burden, or the level of interest the government must show in the infringement to overcome the presumption in favor of exempting the sacred site from development. This case, like *Sherbert, Thomas*, and *Hobbie*, is at the heart of our free exercise jurisprudence: the protection of religious minorities from governmental pressure to conform to the mainstream is central to the pluralism that the free exercise clause safeguards.

The existence of a burden on religious exercise is not a matter of dispute. The government openly concedes, "the government actions at issue here infringe upon important elements of [Native American] religious beliefs." Brief for Petitioner at 21. Since the free exercise clause guarantees the freedom to worship whenever a compelling state interest does not overbalance the individual interest in religious exercise, it is clear that a free exercise claim is stated here. The attempt to subsume all infringements under a "coercion" requirement must fail.

Congress, responding to the concerns of Native Americans regarding site-specific religions, enacted the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1982), to "insure that the policies and procedures of various federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the

free exercise of religion." 1978 *U.S. Code Cong. & Ad. News* 1262. The Act, while it may not provide for greater protection than that contained in the free exercise clause, is a formal congressional acknowledgement that government action on public lands does infringe Native American beliefs and practices, and that Indian religions must be accorded meaningful protection in ways not generally necessary for protection of more "mainstream" religious interests.

The court below correctly assessed the role of the sacred sites to the Native American tribes that use the area:

There is a great deal of evidence in the record that the high country is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the "power" that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use. Finally, there is much evidence that the religious lives of many other Indians depend upon the services of those leaders who have received the necessary "power" in the high country. On all these points, there is virtually no evidence to the contrary.

795 F.2d at 692 (footnote omitted).

Clearly, the tribes that use the high country have shown that their religious beliefs and practices will be substantially infringed if development of the area is permitted. Their religious worship, which takes place regularly in the high country, is directly threatened by the proposed development.

## II. NO COMPELLING STATE INTEREST JUSTIFIES BURDENING NATIVE AMERICAN RELIGIOUS PRACTICES.

Once it has been established that the development of the high country infringes the rights of the tribes that worship there, the government must show that a com-



elling state interest, narrowly tailored to accomplish the objective in the least restrictive means possible, justifies the infringement. *Sherbert v. Verner*, 374 U.S. 398 (1963). As this Court held in *Wisconsin v. Yoder*, 406 U.S. at 215:

[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Given that "logging and the construction of logging roads would be utterly inconsistent with the Indians' practices," 795 F.2d at 692, the government must demonstrate that its interest in the development of this particular site is so overwhelming that it outweighs the virtual destruction of the tribes' ability to practice their religion. 795 F.2d at 693. ("[T]he proposed government operations would destroy the plaintiff Indians' ability to practice their religion.")

As the government's brief appears to concede by its strenuous argument for application of a lesser "reasonableness" standard, there is no compelling interest in the development. As originally proposed, the logging operations and road construction would have permitted timber harvesting throughout the high country. While this litigation was pending, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984), removing much of the area from potential development. Nonetheless, a portion of the originally planned logging operation, and a six-mile stretch of road, remain as a threat to Native American practices. Thus, while the government's potential benefit from the development has been reduced sharply by the exemption of a major portion of its targeted logging area, the threatened harm to the Native American religious groups is as ominous as ever.

The fact that the potential infringement is so drastic, coupled with the reduction in available timber for har-

vesting brought about by the California Wilderness Act, demonstrates that any state interest in implementing the development is overbalanced by the free exercise interests of Native American worshipers.

In a further attempt to downplay the free exercise rights of native religious groups, the government argues strenuously that this case is similar analytically to the Native American religious claim made in *Bowen v. Roy*, 106 S.Ct. 2147 (1986). Even a brief review of the facts of *Roy* reveals that this argument is untenable. The plaintiff in *Roy* claimed that he should be able to prevent use of his daughter's already-existing social security number, because the existence and use of such a number would jeopardize her spiritual welfare. Chief Justice Burger's plurality opinion represented a majority on the question whether the plaintiff had a free exercise right to enjoin use of the number. In holding that he did not, the Court stressed that Roy did not have the right to require "Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 106 S. Ct. at 2152.

Two fundamental differences in the facts of this case distinguish it from *Roy*. First, it is clear that development will interfere directly with regularly-held Native American religious rituals conducted in the high country. In *Roy*, the use of the social security number for internal auditing and processing purposes only, presented no such stark infringement of actual religious practice. Second, the strictly intra-governmental nature of the use at issue in *Roy* presents a contrast to the public nature of the development of land to which the public has access. 795 F.2d at 695.

Thus, while it is true that a religious adherent may not restructure government to suit his spiritual convictions, it is also true that governmental interference with religious exercise, such as the rituals and pilgrimages at

issue here, must be justified by a compelling state interest. As this Court held recently in *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1049 (1987), even when government is providing a benefit, it may not condition receipt of that benefit on an infringement of the recipient's religious beliefs and practices, unless a compelling state interest justifies the infringement. *Hobbie* explicitly rejected a reasonableness argument similar to the one made by the government in this case. Facial neutrality and a legitimate public interest do not satisfy the requirements of the free exercise clause. In its dealings with the beneficiaries of an unemployment compensation program, as opposed to genuinely internal procedures, the government still must satisfy the compelling state interest/least restrictive means test.

Similarly, when a governmental program is held on land to which the public has access, just as when it is related to benefits available to all who qualify, the nature of the activity ceases to be "internal." After all, the commands of the first amendment are addressed expressly to government, and it is to governmental activities that affect the interests of individuals and groups that the free exercise clause applies. Pushed to an unwarranted extreme, the language of *Roy* could be read to preclude relief for any activity that was characterized self-servingly by the government as "internal." In fact, the holding of *Roy*, and the subsequent clarification of *Roy* in *Hobbie*, demonstrate that, in its dealings with the public, such as on public lands and in the distribution of unemployment benefits, the compelling state interest/least restrictive means test applies. Once the government invites the public onto its property, it must respect the free exercise rights of those who use the area. Just as in *Hobbie*, *Thomas* and *Sherbert*, the government here, even if it may not be constitutionally compelled to open its wilderness areas to the public, may be required to conform its use of the property to constitutional mandates once it has allowed access.

### III. THE PUBLIC FORUM DOCTRINE PROVIDES A USEFUL ANALOGY TO ANALYSIS OF NATIVE AMERICAN FREE EXERCISE CLAIMS TO PROTECT SACRED SITES.

As noted earlier, free exercise claims typically are framed in terms of an individual's right to exemption from a statute regulating conduct, rather than seeking protection of a sacred site. *See supra*, 6-7. The fact that the requested relief is different, however, reflects a difference in theology, rather than a less compelling religious claim. Much like the free exercise plaintiffs whose beliefs spring from the Jewish and Christian traditions, Native American religious groups seek exemption from generally applicable regulations. They do not, for example, ask government to conform its behavior to be consistent with their beliefs; they merely ask that certain sites, because of their unique religious significance, be exempted from otherwise valid and neutral development plans. The overwhelming majority of such plans would be of no concern to Native American religions; they seek exemptions only for those sites of central importance, where no compelling state interest justifies development. The Native American religious interest is in preservation of sacred sites, rather than in the invalidation of proposed development of all public lands. This exemption should be distinguished from a subsidy; contrary to the Solicitor General's argument, the plaintiffs do not seek active government support—monetary or otherwise—of their religious practices.

Although an exemption from development differs from the standard relief requested by a free exercise plaintiff, such limitations are not unknown in constitutional jurisprudence. Limitations on government control of public lands imposed by the guarantees of the first amendment have long been recognized in the concept of the public forum. For example, in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), this Court stated:



Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (government may not regulate use of its lands so as to discriminate against long-held first amendment rights); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious expression may not be excluded from public streets merely because it is "offensive").

The public forum doctrine has also been applied to protect religious practices. In *Kunz v. New York*, 340 U.S. 290, 293 (1951), the Court held that "the right of a municipality to control the use of public streets for the expression of religious views" is circumscribed by the first amendment, and invalidated an ordinance that had been used to convict an evangelical Baptist minister for speaking without a permit. Indeed, the Court has often used the public forum concept in analyzing cases with both speech and free exercise elements in general first amendment terms. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lovell v. Griffin*, 303 U.S. 444 (1938). The constitutional protection of first amendment activity that has taken place on public land "from time immemorial" naturally includes within its ambit not only speech and assembly, but also provides a guide for analysis of traditional Indian religions and worship, which have been observed at sacred sites for thousands of years in some instances. See generally, Note, *Indian Religious Freedom*, *supra*, at 1466-67 (arguing that public forum doctrine should apply to site-specific Native American free exercise claims).

Applied to this case, the public forum doctrine both clarifies the nature of the requested relief, and provides a useful limitation on the protection of sacred sites. As this Court pointed out in *Wisconsin v. Yoder*, 406 U.S.

at 226-27, where a religious way of life existed long before the state activity or regulation that threatens it, the free exercise clause protects the religious interest against all but the most compelling of state interests. A similar protection should apply to Native American claims to prevent destruction of sacred sites that existed long before the issue of title to the land was ever considered. Given a showing of infringement of belief, this analysis would hold, the free exercise clause would apply to current native religious practices at a particular site that predate European settlement or extinguishment of aboriginal title.<sup>4</sup> This "traditional worship" application of the public forum doctrine generally would exclude new religions from the ambit of site-specific constitutional protection. For example, under this theory, a person who claimed that the Lincoln Memorial was an incarnate god would not be entitled to preserve the Memorial from alteration or destruction: the public forum analogy protects those Native American religious practices, like the one at issue here, that have existed from "time out of mind." Note, *Indian Religious Freedom*, *supra* at 1466, n.90.<sup>5</sup> The tradition and history of worship at a particular site, given that the religious exercise involved may be performed only at that site, are analogous to the first amendment activities protected under the public forum rubric.

<sup>4</sup> Even if Native American worship at sacred sites began after installation on a nearby reservation, the doctrine would apply if the tribal presence is the result of unwilling migration or treaty compliance. In this light, the government should be estopped from denying a right to native worship at a site, if its own actions forced the worshippers to move to reservations.

<sup>5</sup> Further, if a religion had lapsed, and no active worship took place at a formerly sacred site, the public forum doctrine would not apply. Aside from issues of standing to raise the claims of adherents who no longer practice a religion, a sacred site would not be entitled to free exercise protection under the public forum doctrine analogy unless the history and tradition of worship was preserved by actual religious rites and rituals.



As this Court noted in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." The same respect for first amendment activity, which in this case can be meaningful only in an area that is both by long tradition and by government fiat open to the public, should apply to protect the very basis of Native American belief and worship.<sup>6</sup> To satisfy its burden, the government must show "strict incompatibility" with the claimed religious right. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. at 808. By contrast, the government's emphasis in its brief on limiting the Court's scrutiny to a mere "reasonableness" level, and on the existence of statutory "consultation" requirements, see Brief for Petitioner at 37-41; 34-36, does not approach the level of review mandated by the free exercise clause, and applied by this Court in all but the most exceptional circumstances.

<sup>6</sup> Contrary to the government's argument, the "logical implication" of applying the public forum doctrine to site-specific Native American free exercise claims does not mean that "all aspects of government's management of its property are subject to review under the public forum rubric." Brief for Petitioner at 33 n.27. As this Court has held, not all government property is open to the public, and in cases of a nonpublic forum, the doctrine obviously would not apply. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). Further, even when government property has been designated by government as open to the public for some purposes, but not for general access to engage in first amendment activity, a limited public forum exists. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*.

Thus it is in the context of the traditional public forum, see *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985), that the analysis proposed here would apply. In addition, the doctrine would of course apply if, for example, the government had allowed access for some kinds of religious activity, such as prayer meetings or Bible readings by religious groups, and then sought to destroy a sacred site. *Widmar v. Vincent*, *supra*.

Given that the religious activity here is essential to the continuity of the Native American religions practiced by the respondents, and that the activity takes place in the traditional public forum setting, the religious interests at stake should be protected against all but "those interests of the highest order," *Yoder*, 406 U.S. at 215, implemented by the least restrictive means possible. The clear absence of such a compelling interest in development dictates that the construction and logging be enjoined as violative of Native American free exercise rights.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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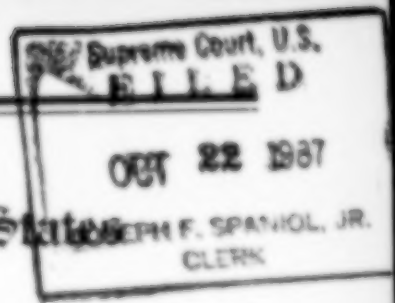
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**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

RICHARD E. LYNG, Secretary of Agriculture, *et al.*,  
—v.—  
*Petitioners,*

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## INTEREST OF AMICI<sup>1/</sup>

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to furthering and defending the protections embodied in the Constitution and the Bill of Rights. Its local affiliates include the ACLU of Southern California and the ACLU of Northern California.

Throughout its history, the ACLU has consistently defended the right of individuals within our society to practice their religion free from unwarranted government interference. Thus, the ACLU has provided either direct representation or amicus support in virtually every

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<sup>1/</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of this Court.



religion case which has come before this Court since the 1930's.

The present case once again raises important issues regarding the scope and application of the free exercise clause. In particular, petitioners' attempt to reduce the level of judicial scrutiny in free exercise controversies is inconsistent with the notions of religious liberty embodied by the framers in the First Amendment.

## STATEMENT OF THE CASE

Amici adopt the statement of facts set forth in the district court's opinion. 565 F.Supp. 586 (N.D.Cal. 1983).

## SUMMARY OF ARGUMENT

### I.

Respondents' right to the free exercise of religion would be violated by construction of the Chimney Rock section of the G-O Road because an indispensable element of their religious practice would be taken from them by the government without a compelling reason.

Contrary to the suggestion of petitioners and amici arguing in support of petitioners, the free exercise clause is not limited to situations in which the government compels religiously offensive

conduct or a choice between government benefits and the practice of religion. Indeed, government action that precludes the practice of religion is the most egregious form of government interference with religion, and should be reviewed under the most exacting standard regardless of whether the government simultaneously compels religiously offensive behavior.

## II.

Petitioners' novel argument that free exercise claims related to public lands should be treated the same as free speech claims involving nonpublic fora, and therefore reviewed under a reasonableness standard, is also misplaced.

As petitioners concede, the parks represent a "quintessential" public forum under this Court's decisions. Contrary to petitioners' contention, however, the

notion of a quintessential public forum includes more than a right of access; it includes, as well, the right to engage in protected First Amendment activities unless overridden by a compelling state interest.

Respondents' past practices have, in any event, created a limited public forum. Petitioners and their ancestors have been using this land for religious purposes with government permission since the nineteenth century. The imposition of a new and significant burden on those practices is properly subject to strict judicial scrutiny.

Finally, the government's undisputed right to control its own property has never been extended to bar First Amendment activity that cannot take place at any other location. To the contrary, the Court has repeatedly stressed, even in nonforum

cases, the existence of other opportunities for speech. Here, of course, respondents' religious rituals are site-specific. They cannot be moved without being destroyed.

### III.

Finally, the claim of amici arguing in support of petitioners that granting an injunction against construction of the Chimney Rock section will create an establishment of religion is unsupported by precedent. The accommodation of legitimate free exercise clause claims in a religiously neutral manner does not represent an establishment clause violation. The numerous federal and state statutes and regulations that offer exemptions for religious practitioners bear witness to the tradition of acknowledging religion where that is necessary to avoid government interference with religious

practice. Furthermore, there is no establishment clause violation in this case even applying the traditional establishment clause test.

### ARGUMENT

#### I. CONSTRUCTION OF THE CHIMNEY ROCK SECTION OF THE G-O ROAD WOULD CONSTITUTE A BURDEN ON RESPONDENTS' RELIGIOUS PRACTICES

The trial in this case established as a matter of fact that respondents will be unable to practice their religion if the Chimney Rock road is constructed as planned through the "high country." Specifically, the district court found that communication with the "great creator" in the high country is "central and indispensable" to the performance of respondents' rituals and ceremonies. 565 F.Supp. at 594. The court also found that



respondents' religious leaders derive "power" through their experiences in the high country that are necessary to fulfill their traditional religious roles. Id.

As the Forest Service itself concluded in a pre-litigation report: "Intrusions on the sanctity of the . . . high country are . . . potentially destructive of the very core of the Northwest [Indian] religious beliefs and practices." Id.<sup>2/</sup> There is, in short, little dispute that the unique function of the high country in respondents' religious life will be effectively destroyed by the noise, disturbance and pollution that will inevitably accompany road construction.

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<sup>2/</sup> This Court has long recognized that even "indirect" burdens can substantially limit free exercise rights and thereby trigger strict scrutiny under the First Amendment. E.g. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

While acknowledging these likely consequences, petitioners dispute their constitutional significance by arguing that they do not represent a "burden" on respondents' free exercise rights. Petitioners' Brief at 22-23. Petitioners support this counterintuitive proposition with two alternative arguments. Neither is persuasive as a matter of logic or constitutional law.

First, petitioners argue that free exercise rights are burdened only if the government (a) compels conduct contrary to one's religious beliefs or (b) forces one to choose between one's religious belief and government benefits. Id. In the government's view, therefore, this is not a free exercise case even assuming that the completed road will prevent respondents from practicing their religion.

The government does not and cannot offer any explanation for the distinction it draws. Indeed, the distinction is undermined by the government's simultaneous concession that individuals are constitutionally entitled to practice their religions free from unwarranted government coercion. Id. at 22.

Coercion in this context can take many forms. Most often, perhaps, this Court's religion decisions have involved efforts by the government to compel religious behavior. E.g. Torcaso v. Watkins, 367 U.S. 488 (1961). It is no less coercive, however, for the government to prohibit the exercise of core religious practices.

Regrettably, the history of Native Americans is replete with examples of such government coercion, including nineteenth century prohibitions on ceremonial

dances,<sup>3/</sup> the criminalization of peyote use,<sup>4/</sup> and the prohibitions on taking of game necessary for Indian religious rituals.<sup>5/</sup>

None of these instances required Native Americans to act contrary to their religion; they were simply prohibited from practicing their religion. The same is true her. It is important to recognize, moreover, that prohibiting respondents from using the high country for religious purposes is comparable to barring

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<sup>3/</sup> Department of the Interior, Regulations of the Indian Department 496-97 (1884).

<sup>4/</sup> See e.g. People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). But see 21 C.F.R. §1707.31 (exempting religious users of peyote from federal drug laws).

<sup>5/</sup> See Frank v. State, 604 P.2d 1068 (Alaska 1979).

Christians from partaking of the sacrament.<sup>6/</sup>

As Justice Stewart once suggested, "a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) (emphasis in original). Respondents' claim in this case is both simpler and stronger. They are not asking the government to support their religious practices but merely to allow those religious practices to continue.

The distinction petitioners offer between a government compulsion to act

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<sup>6/</sup> Interestingly, the 18th Amendment to the Constitution prohibited manufacture and sale of alcohol only for "beverage purposes."

contrary to one's religious beliefs and a government impediment to acting in conformity with one's religious beliefs is, moreover, unworkable in practice. Like most affirmative/negative distinctions, it depends almost entirely on how the question is framed.

For example, Wisconsin v. Yoder, 406 U.S. 205 (1972), can be described as a case in which Amish parents were required to send their children to school in violation of their beliefs or as a case in which Amish parents were barred from educating their children at home according to the dictates of their religion. Similarly, Sherbert v. Verner, 374 U.S. 398 (1963), can be described as a case in which plaintiff, a Seventh Day Adventist, was compelled to work on her sabbath or as a



case in which she was barred from practicing the observance of her sabbath.

The decision in Sherbert also refutes petitioners' secondary argument -- that whatever burden may be placed in this case on respondents' religious practices is only an indirect result of the government's land management policies and thus not cognizable under the free exercise clause. As this Court noted in Sherbert, government actions that impede religious practice are "invalid even though the burden may be characterized as being only indirect." 374 U.S. at 404. See also Braunfield v. Braun, 366 U.S. 599, 607 (1961).

Petitioners' reliance on Bowen v. Roy, 476 U.S. \_\_\_, 90 L.Ed.2d 735 (1986), is similarly misplaced. Although the Court concluded in Bowen that use of a Social Security number did not impermissibly

burden plaintiffs' religious beliefs, the case is easily distinguishable on several grounds. Most important, there was no finding in Bowen that the use of a Social Security number would completely preclude the practice of plaintiffs' religion. Here, that critical finding was made by the district court, 565 F.Supp. at 594-95, and adopted by the Ninth Circuit, 795 F.2d at 693.

Second, the governmental system challenged in Bowen was in place for approximately fifty years before it was challenged. Thus, the plaintiffs in Bowen were attempting to alter the status quo -- a status quo that had long co-existed with their religion. Here, by contrast, respondents are seeking to preserve the status quo and to preserve their religious

practices that depend on maintenance of existing conditions.

Third, Bowen involved "internal procedures" of the government in a way this case does not. 90 L.Ed.2d at 745. Management of public resources is a policy-making process, more like judgments about public education than judgments about "the size or color of the Government's filing cabinets. Id. Indeed, the notion that management of public property is an "internal" matter for the government, and therefore insulated from traditional First Amendment doctrine, is at odds with at least a half-century of this Court's jurisprudence. E.g. Cantwell v. Connecticut, 310 U.S. 296 (1940).

## II. FREE EXERCISE CLAIMS INVOLVING PUBLIC LANDS SHOULD NOT BE ANALYZED UNDER THE REASONABLENESS STANDARD

In Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), this Court stated: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Ignoring that well-settled principle, petitioners contend that respondents' free exercise claim should be analogized to a free speech claim involving a nonpublic forum, and hence should be resolved in favor of the government so long as the government has a "reasonable basis" for its decision.

In pressing this claim, petitioners are merely reformulating the argument advanced by Chief Justice Burger in Bowen v. Roy, supra. However, in Bowen itself, a majority of this Court rejected the effort to replace the strict scrutiny traditionally applied in free exercise cases with a diluted "reasonableness" test.

As Justice O'Connor observed in her concurring opinion:

Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

90 L.Ed.2d at 762. Moreover, Justice O'Connor's views were adopted last Term by six Justices of this Court in Hobbie v.

Unemployment Appeals Comm'n, 480 U.S. \_\_\_, 94 L.Ed.2d 190, 198 (1987).<sup>2/</sup>

The reason for this Court's extreme sensitivity to free exercise claims is its recognition that religion is a fundamental part of individual identity, and that the pursuit of spiritual fulfillment is integral to the lives of many individuals. As one commentator has stated, "[T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect." Clark, "Guidelines for the Free Exercise Clause," 83 Harv.L.Rev. 327, 337 (1969).

<sup>2/</sup> While this Court has indicated that it will be more deferential when restrictions on free exercise of religion arise in the military context Goldman v. Weinberger, 475 U.S. \_\_\_, 89 L.Ed.2d 478 (1986), it has refused to dilute the requirements for sustaining government regulations outside this "'specialized society separate from civilian society'" Id. at 483, quoting Parker v. Levy, 417 U.S. 733, 743 (1974).



The fact that respondents' free exercise claim involves government decisions about land management does not make this case equivalent to a free speech case involving a nonpublic forum, and hence reviewable under a "reasonableness" test.

In the first place, public parks represent a "quintessential" public forum that has traditionally been reserved for First Amendment activity. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. CIO, 307 U.S. 496 (1939). Petitioners recognize this principle but argue that the public forum doctrine only guarantees access, not the right actually to engage in any First Amendment activity. Petitioners' Brief at 40.

That proposition is refuted by its mere articulation. In every public forum

case this Court has ever decided, the issue was access to public property for the purpose of engaging in First Amendment activity. This Court has never suggested that access and speech (or in this case, access and religious practice) are severable First Amendment issues.

In a quintessential public forum, neither access nor the First Amendment activity for which access is sought may be barred absent a compelling state interest. See Widmar v. Vincent, 454 U.S. 263 (1981). Moreover, the same rules apply even if the park is regarded as a "limited" public forum to which respondents have historically been granted access to perform their religious rituals. Perry, 460 U.S. at 45.

It is true, of course, that government ownership of property does not guarantee a First Amendment right of access, United

States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129 (1981). This Court, however, has never used the public forum doctrine to bar core First Amendment activity that cannot take place in any other location.

In Perry, for example, the union seeking access to teachers' mailboxes was able to communicate with the teachers via bulletin boards set aside for that purpose as well as by direct mail. Likewise, in Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985), the non-profit groups denied participation in the Combined Federal Campaign could solicit donations from federal employees through other channels, including direct mail and in-person solicitation outside the workplace.

Here, respondents' religious practices are clearly site-specific and the site they have chosen is a traditional public forum. They cannot simply select another sacred land once a road is built. These unique circumstances support, rather than undermine, the need for strict judicial scrutiny.

Petitioners are plainly concerned that federal land management operations will be constrained if respondents are able to sustain their free exercise claim. Furthermore, they are concerned that the government will be required to sort through numerous challenges to its conduct to determine whether the challenges are based on a sincerely held religious commitment.

Similar concerns were raised and addressed in Yoder, supra, where the Court relied on the long history of organized

religious practice by the Amish to buttress its decision to exempt Amish children from compulsory education laws. Likewise, in Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979), a case analogous to the instant case because it too involved public resource management, the Alaska Supreme Court rejected the claim that allowing Indians to hunt moose without regard to the game laws would lead to an unmanageable line drawing problems.

Courts can and do draw reasonable lines in constitutional cases all the time. Of particular relevance, courts have been extraordinarily hesitant in finding that an individual or group's religious practices can only take place if public land is maintained in a particular condition. See e.g. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.

1980), cert. denied, 449 U.S. 953 (1981). Courts have been especially reluctant to make such a finding where religious observances have continued after past alterations in the land. See e.g. Wilson v. Block, 708 F.2d 735 (D.C.Cir. 1983), cert. denied, 464 U.S. 1056 (1984) (enlargement of ski area not found to violate free exercise clause where practice of religion continued after development of initial ski area).

In the instant case, however, it is plain from the record that respondents' religious practices cannot coexist with the contemplated road. This special circumstance compels a strong governmental showing before construction of the Chimney Rock section can be constitutionally justified.

If petitioners are correct that unfettered discretion to manage federal



land is essential for the government to function, and the only way of promoting the government's wishes in this case is to construct the Chimney Rock section, then that interest will emerge and receive due consideration under a "compelling interest" standard. It does not require diluting the standard of review that this Court has consistently applied in free exercise cases.

On the present record, neither the district court, 565 F.Supp. at 595-97, nor the Ninth Circuit, 795 F.2d at 694-95, found the compelling interest test met. In reaching that conclusion, both courts appropriately stressed the absence of any showing by the government that its interest in land management could not be adequately served by a rerouted road. That

deficiency in the record is fatal to petitioners' case.

III. ENJOINING CONSTRUCTION  
OF THE CHIMNEY ROCK SEC-  
TION DOES NOT EFFECT AN  
ESTABLISHMENT OF RELIGION

Amici supporting petitioners, but not petitioners themselves, argue that a judicial order enjoining construction of the Chimney Rock section will violate the constitutional guarantee against establishment of religion. It is not surprising that petitioners themselves do not make this argument. There are numerous federal and state laws that recognize religion in order to accommodate free exercise.

If accepted, amici's argument would jeopardize the federal tax exemption for non-profit church property sustained in

Walz v. Tax Commission, 397 U.S. 664 (1970); the federal exemption from self-employment social security taxes for religious objectors (26 U.S.C. §1402(g)); the federal regulations exempting religious users of peyote from application of the drug laws (212 C.F.R. §1307.31); the federal statute exempting certain religious slaughtering of animals (7 U.S.C. §1902(b)); and the federal law that exempts religious objectors from military service (50 U.S.C. §456(d)). It would also call into question the American Indian Religious Freedom Act (42 U.S.C. §1996), which requires federal agencies to take account of impacts on Indian religious practices when making administrative decisions.

It is worthwhile noting that many of these laws have been involved in litigation in this Court, and nowhere has

this Court suggested that there is a violation of the establishment clause. See e.g. United States v. Lee, 455 U.S. 252 (1982). Indeed, this Court's attitude toward laws and judicial decisions designed to preserve the free exercise of religion has been a tolerant one. As the Court stated in Hobbie v. Unemployment Appeals Comm'n on Florida, 94 L.Ed.2d at 200: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."

One noted commentator has suggested that the appropriate standard for reconciling the establishment and free exercise clauses should be based on a distinction between "governmental actions arguably (even if not beyond doubt)

compelled by the free exercise clause, and governmental actions supportive of religion in ways clearly not mandated by free exercise." L. Tribe, American Constitutional Law 822 (1978). Applying this analysis, actions "arguably compelled" by the free exercise clause would not be forbidden under the establishment clause. See also Choper, "The Religion Clauses of the First Amendment," 41 U.Pitt.L.Rev. 673, 691 (1980).

Even if one were to apply the test of Lemon v. Kurtzman, 403 U.S. 602 (1971), to the district court's injunction against the Chimney Rock section, the injunction would not violate the establishment clause. The first two parts of this test focus on the government's purpose and the effect of

government action, both of which must be primarily secular, not religious.

Contrary to the suggestion of amici, accommodating free exercise rights in a religiously neutral manner does not constitute an impermissible religious purpose nor does it impermissibly advance the cause of religion. In Yoder, decided just one year after Lemon, this Court had no trouble finding that a court decision exempting Amish children from the compulsory education laws did not violate the establishment clause. The Court there found that "the purpose and effect" of exempting the Amish was "not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the



Wisconsin compulsory education law would impose." Yoder, supra at 234 n.22.

Similarly, an injunction against the Chimney Rock section would be designed to permit respondents' age-old religion to survive free from the heavy impediment that the road would represent. Obviously enabling religious practice to continue without government interference is not an impermissible government purpose and does not produce an impermissible effect under the establishment clause.

The third component of the Lemon test focuses on whether the government's action would create "excessive entanglement" between government and religion. For example, last term in Hobbie, supra, this Court resolved the question whether allowing unemployment compensation to a person who quit his job for religious

reasons would constitute an establishment clause violation by considering whether the accommodation would "entangle the State in an unlawful fostering of religion." 94 L.Ed.2d at 200. It found no such entanglement. Id.

Indeed, enjoining the Chimney Rock section produces less entanglement than petitioners' proposed alternative of building the road but monitoring its effects on Indian religious practices and seeking to mitigate those effects. Petitioners' alternative would involve the government in an ongoing assessment of religious needs and the competing needs of other forest users. By contrast, a decision to cancel or reroute the road is a one-time only event with no ongoing connection, either actual or symbolic, between the state and religion. Cf. Tilton

v. Richardson, 403 U.S. 672 (1971)

(upholding one-time aid to church-related colleges for construction of buildings for secular instruction).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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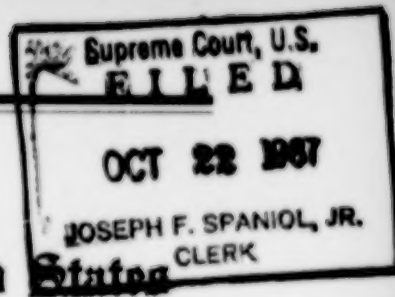
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October 20, 1987



**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**  
October Term, 1986

RICHARD E. LYNG, Secretary of Agriculture, et al.,  
*Petitioners,*  
*v.*

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, et al.,  
*Respondents.*

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**BRIEF AMICI CURIAE OF  
AMERICAN JEWISH CONGRESS,  
IN BEHALF OF ITSELF AND  
THE BUREAU OF CATHOLIC INDIAN MISSIONS,  
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress

religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent justifications sufficiently important to outweigh the interest in religious liberty.

This case is one more in a line of cases coming before this Court in recent years--beginning with Jensen v. Quaring and including Bowen v. Roy and the pending case of Employment Div. v. Smith, 86-946, 86-947, raising the question of how a court is to assess an interest asserted to be compelling. Government agencies have attempted over the years to water down the content of this compelling interest requirement, an invitation this Court has so far declined. Amicus files this brief to reiterate its view that

mere thoughtless actions, or post-hoc rationalization such as amicus believes are present here, do not carry government's burden.

The Bureau of Catholic Indian Missions for more than a century has been concerned about the rights of American Indians and has frequently gone to court in their behalf. The Bureau believes there has not been sufficient concern for the religious rights of the American Indian in the Chimney Rock section in California; it wishes to express the long tradition that the Indians have had for religious worship in the area and highlight the disregard that modern man has shown for the Indian religion in his desire to increase the number of roads in the area.

This brief is submitted with the consent of the parties.



## SUMMARY OF ARGUMENT

1. The government offers three reasons why a judgment enjoining it from building a road which would destroy respondents' sacred places should be reversed. It argues that the road would not impose any cognizable burden on respondents, that the compelling interest standard must be substantially modified in cases challenging the uses to which government lands are placed, and that the courts below failed to accord substantial deference to administrative land management decisions. None of these arguments has merit.

2. The American Indian Religious Freedom Act, (AIRFA) is a statutory restatement of the Free Exercise Clause, as its legislative history states and this Court's decision in Bowen v. Roy, 106 S.Ct. 2147 (1986) holds. Among the types of infringements of Indian rights the

AIRFA was intended to forestall were those resulting from public land management decisions. The Congressional determination that such decisions can burden free exercise rights of Native Americans ought to be conclusive here.

3. The Congress correctly interpreted the Free Exercise Clause in so legislating, notwithstanding the government's efforts to bring this case within the holding of Bowen v. Roy, supra, that internal government practices are not subject to the strictures of the Free Exercise Clause, and its argument that the building of the Chimney Rock section did not, in fact, burden the religious practices of the respondents. The latter claim hardly needs discussion; it is extensively rebutted by the study by a noted ethnographer commissioned by the government, as well as the findings of the lower courts. There might be other

places at which respondents could pray, but neither this Court nor anyone else could say that those places would be as efficacious from a religious point of view as the ones which would be destroyed.

4. The government's legal argument that it is under no constitutional obligation to act in ways that further respondents' "spiritual development" is no more persuasive. To hold otherwise, it argues, would require it, for example, to create social welfare programs to avoid the harm to religious doctrines arising from an open disagreement between religious doctrine and political decisions.

These arguments mischaracterize respondents' position. They do not object to what the government does because they want to be spared the pain of having the government adhere to positions at variance with their own



religious preachings. Rather, they object to a government action which will directly impede the practice of their religion by destroying irreplaceable religious sites.

5. While it is true that most of this Court's modern Free Exercise cases are exemption cases, and thus do not bar government from acting except at the margins, there is no principled reason why the Clause is inapplicable to direct interference with religion where the only relief available is an injunction preventing the government from proceeding at all.

6. Although on the facts presented here respondents are entitled to prevail, it is not the case that an affirmance will mean that Native Americans will prevail in every challenge to public land use. Where a total ban on government activity is sought, the cost to government is

correspondingly greater, and its likelihood of demonstrating a compelling interest is likewise greater. Respondents do not and could not assert that the Free Exercise Clause is a total ban on any development of public lands with religious significance for Native Americans. They claim only that this project cannot be justified under the Free Exercise Clause. Other projects, perhaps more important to the common good, would not be barred by the judgment below.

7. Asserting correctly that the failure to subsidize religion is not a burden on the free exercise of religion, the government argues that respondents seek what amounts to a land subsidy for religion. In the circumstances of this case, that argument will not withstand scrutiny. The sites at issue were sacred to Native Americans well before the Six

Rivers National Forest came into the possession of the federal government. They were preserved for that use by common consent of the surrounding tribes.

It is surely not an impermissible subsidy to allow Native Americans to use these federal lands for religious purposes. Nor, again properly, does the government argue that it was an impermissible subsidy for Congress to set aside the Six Rivers National Forest as wilderness, see Wilderness Act, 16 U.S.S. §1131, in order to preserve Native American religious sites. There is no reason why an injunction against building the road--and it alone--constitutes such a subsidy. A subsidy attempts to substitute the taxing powers for free market support of religion. The injunction below does not do this.



8. The next string in the government's bow is a redefinition of the compelling interest test. The government does not challenge the findings of the lower courts that the government had demonstrated a compelling interest as that concept is ordinarily understood. Instead, it argues that Congress has mandated deference to the land use choices which emerge from the administrative process, and that it has a "compelling interest" in the integrity of that process. The statutes and cases cited, which do accord the government substantial discretion in choosing among competing statutory uses of public lands, do not confer any special authority on the Executive to resolve constitutional claims. There is nothing so unique about land use decisions which compels a departure from the general principle of strict judicial review in Free Exercise Clause cases.

9. The Property Clause itself is not so unique as to require special judicial deference. The Bill of Rights was intended to apply to all governmental actions, to prevent government from using its enumerated powers to obtain authority over religion under the guise of exercising an enumerated power. The government's contrary argument stands history, particularly the federalist/anti-federalist controversy, on its head.

10. The government may not use its property without regard to constitutional limitations. While in the non-public forum context this Court has employed a reasonableness test to scrutinize the exclusion of speakers, in those cases the proposed activity was wholly inconsistent with the ordinary legal use of the property, and the asserted speech right was only to more effective speech, not to

speech itself. The injunction below, by contrast, is not only more consistent with the wilderness designation of the land than the construction proposed by the government, but is indispensable to the preservation of respondents' most sacred sites--sites which are at the center of their religious universe.

11. The government's papers may be read as adopting the position that the broad guarantees of the Constitution, such as the Free Exercise Clause, are primarily procedural in nature. Applied to this case, that position asserts that, as long as the government gives fair consideration to respondents' claims, it has not violated their Constitutional rights. That position, which has some scholarly support, has not been accepted by this Court.

12. In any event, the government here did not give fair consideration to



respondents' claims. Instead, it has decided to build this road at whatever cost, as evidenced by the fact that the declaration of the Six River National Forest as wilderness which destroyed the primary justification for the road--the facilitation of logging--has not dissuaded the government from proceeding with its road-building plans.

13. The First Amendment is not, as the government necessarily argues, value free. The draftsmen of the First Amendment struck a balance between Free Exercise and other governmental interests, including economic ones of the type advanced here, and insisted that the balance must be tipped in favor of conscience. The stringency of the compelling interest test reflects that choice. The "social disutility" of an erroneous denial of Free Exercise rights

is, to use Judge Harlan's phrase, so great as to mandate, in this case, the use of the compelling interest test in its traditional form.

ARGUMENT

I. The Chimney Rock Road Would Burden Respondents' Faith

A. Introduction

This case presents three questions: 1) whether the building of a road on public land with unique religious significance so burdens the free exercise rights of Native Americans for whom this land is especially sacred as to require justification; 2) if so, what standard is to be applied; and 3) what governmental branch is charged with assessing the weight of the governmental interests involved.

The government denies that the construction of the Chimney Rock section of the Gaston-Orleans road (hereafter "Chimney Rock section") would impose any cognizable burden upon respondents. It argues (Brief at 21)<sup>1</sup> that there is

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<sup>1</sup> References to Brief \_\_\_, are to the government's brief on the merits.



no cognizable burden because the

Free Exercise Clause is not a judicial mandate for judicial scrutiny of any and all governmental conduct which to a given believer produces a less congenial world. Like many other official actions which in no sense coerce a decision against faith...decisions regarding the management of public lands simply do not implicate the Free Exercise Clause.

See also Brief at 33.

While the existence of a "burden" on religious liberty is the sine qua non of a Free Exercise Clause claim, Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); School Dist. v. Schempp, 374 U.S. 203, 224, n.9 (1963), the construction of the Chimney Rock section would, by destroying sites of undoubted importance to the Native American faith, burden respondents' religious freedom in ways cognizable

under the Constitution. It must therefore be justified under the appropriate Free Exercise Clause standards, Point II, infra.

B. Congress Has Recognized That Public Land Management Decisions Can Burden Native Americans' Religious Liberty

Since the existence of a burden is indispensable to respondents' claims, one would ordinarily look to this Court's cases to determine whether the respondents have alleged and proved such a burden. In Point I, C, infra, amici argue that they have. In this case, however, not only have respondents shown that their Free Exercise rights have been burdened under this Court's precedents, but Congress has recognized that public land management decisions can and do burden Free Exercise rights in constitutionally cognizable ways.

The American Indian Religious Freedom Act, 42 U.S.C. §1996 (hereafter "AIRFA"), was enacted by Congress because federal agencies were insensitive to the First Amendment rights of Native Americans. In the portion of the Act codified at 42 U.S.C. §1996, Congress affirmed that it was:

the policy of the United States to protect...for American Indians their inherent right of freedom to believe, express and exercise the traditional religions....

This policy, as the legislative history makes plain, was simply a statutory codification of the requirements of the Free Exercise Clause;

The intent of [the Act] is to ensure that the policies and procedures of...federal agencies are brought into compliance with the Constitutional injunction that Congress shall make no



law abridging the exercise of religion.<sup>2</sup>

In light of this legislative history, this Court interpreted AIRFA as a statutory embodiment of the Free Exercise Clause in Bowen v. Roy, 106 S.Ct. 2147, 2152 (1986) observing that AIRFA "with its emphasis on protecting the freedom to believe, express and exercise a religion--accurately identifies the mission of the Free Exercise Clause itself."

Among the practices cited by the Congress as exemplifying bureaucratic indifference or hostility towards the constitutional rights of Native Americans were several dealing with public land management, including

actual interference in religious events. In some instances, those who interfere have good motives... These instances include being present at ceremonies

<sup>2</sup> H.Rep. 95-1308, 95th Cong. 1st Sess., at 1, reprinted at 1978 U.S. Code, Cong., & Admin. News 1262 at 1262-63; S.Rep. 95-709, 95th Cong. 2d Sess. at 2.

which require strict isolation, even to the extent of circling the ceremony in small aircraft....  
In areas where the Federal Government has a duty to act or is the only law enforcement at the site, Federal officials have failed to protect Indian religions from intrusions.

S. Report 95-709 at 4 (emphasis added).

Among the further examples cited of violations of Free Exercise rights were refusals to allow Native Americans to bury their religious leaders in traditional cemeteries on federal property (id. at 3), and denying them access to other sacred sites under federal control (id. at 4).

This understanding of AIRFA is confirmed by a report on compliance with the Act prepared by the Executive Branch pursuant to §2 of AIRFA. Repeatedly, the report referred to the obligation imposed by AIRFA to make public land management

decisions consistent with the statutory and constitutional religious freedom rights of Native Americans, see "American Indian Religious Freedom Act Report" (August 1979) p. 51-63. Among the statutes cited by the report as being subject to AIRFA requirements are the Multiple-Use Sustained Yield Act, 16 U.S.C. §528 and the Wilderness Act, 16 U.S.C. §1131 et. seq., the very statutes relied on by the government in support of its arguments for reversal.

Since AIRFA is a statutory embodiment of the Free Exercise Clause, and since the government concedes that AIRFA limits its freedom to manage public lands (Brief at 36), it follows that AIRFA embodies a Congressional determination that the management of public lands is subject to the strictures of the Free Exercise Clause. That finding is entitled to special deference,



Rostker v. Goldberg, 453 U.S. 57, 64  
(1981).

C. As A Matter Of Fact and Law  
Respondents Have Alleged A  
Cognizable Burden

Ignoring the Congressional finding of burden embodied in AIRFA, the government argues both on the facts and on the law that there is here no constitutionally cognizable burden on respondents' First Amendment rights.

i. The Factual Argument

The government argues that in this case there is, as a matter of fact, no cognizable burden on respondents because they are

not require[d]...to abandon any of their religious practices. No element of religious ritual would be rendered unlawful or made more costly if the Forest Service were to carry out its plans and respondents would not be denied access to any religious site.

Petition for Certiorari at 20.

These claims are contradicted by the very study by a noted ethnographer, D. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979) (hereafter Theodoratus Report), which the government commissioned and now claims demonstrates that it gave careful, sympathetic, indeed "textbook" (Brief at 36) consideration to the impact of the Chimney Rock section on the religious practices of the respondents.

The Theodoratus report details how the construction of the Chimney Rock section would destroy the essence of the faith practiced by respondents and their ancestors. Joint Appendix 197, 199-20. Indeed, the government now concedes (Brief at 21) that "the government actions at issue here infringe upon important elements of those religious beliefs."

Respondents' faith depends on the pristine condition of the high country area, both to protect the holy sites themselves, and to protect the ability of the faithful to be in solitude as they avail themselves of the spiritual power of the high country., J.A. 132-32, 150-51.<sup>3</sup> It also requires practitioners to gradually acclimate themselves to the high country and to its ascending levels of spirituality, by stopping at various points along the traditional trails to those sacred sites. J.A. 134, 171-73. Many of these places will either be paved over or be too noisy for such use if the Chimmey Rock road is

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<sup>3</sup> Other courts, in other contexts, have recognized that land preserved in its native state is conducive to worship. See, in the real estate tax exemption context, Grady v. Hausman, 509 So.2d 1316 (Fla. App. 1987); Order Minor Conventuals v. Lee, 64 A.D.2d 227, 409 N.Y.S. 2d 667 (3d Dept. 1978).



built, as the Court of Appeals and the District Court found, 8a, 63a-64a.<sup>4</sup>

It is literally true that respondents' prayers would not be prohibited if the road were built. Nor would they cost more in a financial sense. Native Americans might even be able to go elsewhere to pray in the high country, where pristine conditions still exist.<sup>5</sup> However, neither the government nor anyone else can prove what the spiritual cost of such a move away from traditional prayer sites would be to Native Americans.

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<sup>4</sup> Cites \_\_\_\_\_ a are to the appendices to the government's petition for certiorari.

<sup>5</sup> Under the government's theory that there is no cognizable burden in land management cases, it could destroy the pristine condition of the entire high country, and leave respondents no place to pray, and yet be immune from all constitutional challenge.

For the government to insist that the simple right to go elsewhere removes any burden from the respondents is to deny what is common to many major faiths --that territory can be sanctified, that places used by generations of believers for ritual purposes have special holiness and special conduciveness for prayer.<sup>6</sup>

ii. The Building of Chimney  
Rock Road Is Not An Internal  
Government Practice Within  
the Meaning of Bowen v. Roy

As legal authority for their contention that there is no cognizable burden on respondents' religious freedom,

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<sup>6</sup> The cavalier dismissal of the religious significance of the center of respondents' religious universe is a modern day counterpart of the British offer of Uganda rather than Palestine to the early Zionists, W. Laquer, A History of Zionism: 120-20 (1976). Cf. Jacob's exclamation (Genesis, 28,17), "How holy is this place; this is none other than God's House, and this is the gate to Heaven." See also Solomon's dedicatory prayer, I Kings 8.

the government (Brief at 24-28) relies on the holding in Bowen v. Roy, supra, that the "First Amendment [does not] require the Government itself to behave in ways that the individual believes will further his or her spiritual development," 106 S.Ct at 2152 (Burger, C.J.).<sup>7</sup>

From this holding, the government extracts a general principle that the mere existence of a contradiction between one's religious beliefs and "internal" government behavior does violate the Constitution. It concludes that a decision to locate a road on a particular

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Respondents views cannot be said to fall within the narrow class of beliefs which are "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." Thomas v. Rev. Bd., 450 U.S. 707, 715 (1981).

<sup>7</sup> See for the views of other members of the Court agreeing with the former Chief Justice, id. at 2159 (Blackmun, J., concurring in part); id. at 2161 (Stevens, J., concurring); id. at 2164-65 (O'Connor, J., concurring and dissenting).



strip of public land is an internal decision not subject to the Free Exercise Clause. (Brief at 24-31).

The government posits (Brief at 29) numerous examples of government activity which would be inconsistent with religious belief and which plainly would not implicate the Free Exercise clause. For example, it suggests that some religions might insist on a particular social welfare program. Yet it surely cannot be said that the Free Exercise Clause compels the existence of that program.

The analogy is inapposite. It is plainly true that the mere psychic harm of having government disagree with one's religious teaching does not state a religion clause claim, cf. Edwards v. Aguillard, 107 S.Ct 2573 (1987), just as it is insufficient injury to confer Establishment Clause standing, Valley

Forge Christian College v. Americans  
United, 454 U.S. 464 (1982). All of the  
horribles the government conjures up  
(Brief at 29) are of this type.

The harm suffered by respondents is  
in some sense 'psychic,' since it  
involves a reaction to a sensory  
phenomenon--noise and visual stimuli.  
And no doubt they would be distressed to  
see their religious sites destroyed. But  
to end the analysis there is to let  
labels decide cases. Rather, respondents  
seek to prevent government from actively  
and directly interfering with their  
ability to practice the most fundamental  
rituals of their religion at its holiest  
site. That surely states a Free Exercise  
claim. cf. Pillar of Fire Church v.  
Denver Urban Renewal Authority, 181 Col.  
411, 509 P.2d 1250 (1973).

Respondents' claim is analagous, not  
to a Free Exercise objection to the use

of the bald eagle as the national symbol (Brief at 29), but to a statute that barred private possession of the bald eagle or its feathers, no matter how obtained or which transferred all bald eagle feathers to Fort Knox where they would be inaccessible for religious uses.

The inapplicability of Bowen to respondents' claims is even clearer when its holding is tracked to its source in the concurrence of Justice Douglas in Sherbert v. Verner, supra, 374 U.S. 398, 412 (1963):

[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from government.

Respondents are not demanding that parts of the Six Mile Forest be transferred to their ownership, or that outsiders be barred from the entire forest or sacred high country areas.



Those would be extractions from government. Instead, they ask only that government not actively destroy their sacred ground, but use it instead in keeping with its designation by Congress as wilderness area.<sup>8</sup>

D. The Free Exercise Clause is Implicated By Both Direct and Indirect Burdens

This case does differ from most of the Free Exercise cases decided by this Court which typically involved an

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<sup>8</sup> The government contends (Brief at 29-30) that the lower courts have uniformly held that the claims of Native Americans to preserve their holy places do not state a burden cognizable under the Free Exercise Clause. The reasons for the failure of such claims in the lower courts are far more varied than the the government suggests. Some claims have failed because the government's interests are compelling. That is the basis for the Tenth Circuit's holding in Badini v. Higginson, 638 F.2d 172 (10th Cir. 1980), and an alternative basis for the decision in Crow v. Gullet, 541 F.Supp 785 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983). Others failed because of Establishment Clause concerns not relied only by the government here. (Petition for Certiorari at 24).

individual's claim for exemption from a neutral rule of general applicability. The harm to government in those cases comes at the margins, for there is no question about the validity of the program as a whole.

The only question for the courts in those cases is whether government may insist on unyielding compliance with its rules,<sup>9</sup> or whether it must exempt an objecting individual.<sup>10</sup> Nothing in

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In Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980), the court found that the Native American interests' were either not religious, or not sufficiently religious, to merit protection under the Free Exercise Clause. Accord Dedman v. Bd. of Land and Natural Resources, Haw. \_\_\_, \_\_\_, P.2d \_\_\_ (1987). That was a substantial portion of the holding in Wilson v. Block, 708 F.2d 735, 742-44 (D.C. Cir. 1983).

<sup>9</sup> See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986); U.S. v. Lee, 455 U.S. 252 (1982); Braunfeld v. Brown, 366 U.S. 599 (1961).

<sup>10</sup> See e.g., Hobbie v. Unemployment Appeals Comm'n, *supra*; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pepper, Taking the Free Exercise Clause Seriously, 2 B.Y.U.L. Rev. 334 (1986).

either the text of the Free Exercise Clause, its history, or this Court's cases narrows its scope to exemption-only cases.<sup>11</sup>

That this type of case has not arisen frequently--perhaps because government officials rarely engage in such direct interference with religion--does not mean that there is a principled reason why the Clause does not compel the relief sought here. The absence of comparable cases may mean only that government is reluctant to do to main-line churches what it insists it has the

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<sup>11</sup> In fact, as a comparison of Braunfield v. Brown, 366 U.S. 599 (1961) and Sherbert v. Verner, 374 U.S. 398 (1963) demonstrates, it was the extension of the Free Exercise Clause to exemption or indirect burdens which was problematic a generation ago, not the application of the Clause to direct interference with religious practices.



right to do to Native Americans. Since this Court takes cases as they arise, not to offer a complete exegesis of the Constitution, the absence of controlling cases is of little moment.

In any event, in McDaniel v. Paty, 435 U.S. 618 (1979), this Court invalidated on free exercise grounds a Tennessee statute barring ministers from holding elective office. No exemption could have resolved that case; only a total ban on the challenged government action could remedy the Constitutional deficit.

Consideration of claims seeking a total ban on a particular government activity would not, as the government and the amici claim, bar development of all public lands in the Western United States. Respondents claim no absolute right to the protection of lands to which they attach religious significance. As

their claim comes to this Court, it involves a challenge to a road through lands on which Congress itself placed stringent restrictions on development, see, 16 U.S.C. 1131 et seq., among which is a prohibition on the construction of roads.<sup>12</sup>

In cases in which a plaintiff seeks not an exemption, but a total ban on a government activity, the cost to government is correspondingly greater, and hence the likelihood that government will prevail is also greater.<sup>13</sup> The

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<sup>12</sup> The legislative history of the designation of Six Rivers National Forest as wilderness does leave open the question of whether the Chimney Rock section should be built. See, S.Rep. 98-582, 98th Cong., 2d Sess. at 29.

<sup>13</sup> In addition, the Establishment Clause stands as a substantial barrier to claims which seek to use the Free Exercise Clause as a sword, School Dist. v. Schempp, 374 U.S. 496, 505-06 (1963), to avoid impinging on religious sensibilities, Epperson v. Arkansas, 393 U.S. 97, 106 (1968), those which impose substantial burdens on others, Estate of

spectre conjured up by the government, see Brief at 29, n.25, of Native Americans successfully invoking the Free Exercise Clause as a means of preventing all development in the National or State Parks is simply false. Respondents have repeatedly renounced any intention to make a Free Exercise claim against all development in the Six Rivers Forest. Native Americans, however, are entitled to put the government to its proof that its interests are sufficiently important before it is permitted to destroy Native American religious sites.<sup>14</sup>

E. Respondents' Do Not Seek A Subsidy For Religion

The government argues that respondents' seek not to eliminate a burden on their religious liberty, but

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Thornton v. Caldor Inc., 472 U.S. 703 (1985) or those which seek a subsidy, see pp. 23-27, infra.

<sup>14</sup> This is particularly so given the limited nature of the rights respondent



for government to manage public "lands... in a way that enhances the practice of respondents' religion" (Brief at 31). This is not an Establishment Clause argument, for the government has correctly renounced that claim (Petition for Certiorari at 24, n.15). Rather, the government argues that its failure to subsidize religion is not a violation of the Free Exercise Clause.

The First Amendment generally does not require subsidization of protected activities, Regan v. Taxation With Representation, 461 U.S. 540 (1983); F.C.C. v. League of Women Voters, 468

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seek to vindicate. Assuming an affirmance, the government will retain title to the land and retain most of the benefits accruing from ownership of wilderness land. All that the injunction below does is take one stick from the government's bundle of property rights. Hence it would probably not constitute a taking of property under the Takings Clause, PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Kaiser Aetna v. U.S., 444 U.S. 164 (1979).

U.S. 364, 399-401 (1984); cf. Harris v. McRae, 441 U.S. 297 (1980) (abortion).

Amici agree that the government may not ordinarily confer land subsidies on religious groups under the guise of complying with the Free Exercise Clause, because such subsidies are at odds with the Establishment Clause, PEARL v. Nyquist, 413 U.S. 756, 782, n.39 (1973).<sup>15</sup> Nor can it plausibly be contended that a church or a synagogue has a constitutional right to quiet, to have busy roads located elsewhere, or to special zoning rules to ensure

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<sup>15</sup> See, e.g., ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983); Greater Houston Chapter, ACLU v. Eckels, 589 F.Supp. 222 (S.D. Tex. 1984); (chapel in public park); Annunziato v. New Haven, 555 F.Supp. 427 (D.Conn. 1983) (gift of vacant public school to Jewish day school).

quiet.<sup>16</sup> This, however, is not an ordinary case.

Before European and American settlers came to Northern California, the entire Six Rivers Forest Area was 'owned' by the Native American tribes who inhabited the area. They were free to use the entire area now in dispute for religious observances. By common consent of the Native American people, the religious sites were preserved for ritual use.

As a result of the incursion of white settlers, their taking of land 'owned' by Native Americans, and the need to protect Native Americans from the insatiable demands of the settlers for lands, Native Americans were confined to a small reservation, which did not

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<sup>16</sup> States, however, do have substantial power to provide for quiet in the neighborhood of a religious institution, Larkin v. Grendel's Den, 459 U.S. 116 (1984).



include all their sacred sites. Much of the remaining land ended up under Federal control at the beginning of this century, see generally, Theodoratus Report at J.A. 182-85.

Notwithstanding these developments, Native Americans remained free to use the federally owned land, still in its pristine state, for their religious observances, J.A. 185. Access to public lands that facilitates religious worship, but is not a subsidy of religion, Widmar v. Vincent, 454 U.S. 263 (1981). Neither is it a subsidy for Congress to set aside most of the high country as wilderness, in large part out of respect for the Native Americans' religious needs.<sup>17</sup> See Brief at 33-36. No reason appears why an injunction against the

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<sup>17</sup> H.Rep. 98-40, 98th Cong., 1st Sess. at 32; S.Rep. 98-582, 98th Cong. 2d Sess. at 29.

construction of the Chimney Rock section would constitute a subsidy when these other actions do not.

The injunction lacks the hallmarks of an impermissible subsidy. Respondents do not seek to substitute involuntary exactions from the taxpayers for voluntary contributions of adherents of the Native American religion. Rather they seek to enjoin the government from destroying a religious site central to their religion as it has existed for hundreds, perhaps thousands, of years. The injunction below is entirely consistent with requiring religions to compete in the free market for financial support--as, for example, aid to parochial schools is not.

II. The Compelling State Interest Test Controls This Case.

A. Introduction

The government asserts that the free exercise of religion is simply one value, and not the most important, among many which government must chose in deciding how to use public lands. It argues further that the courts owe the Secretary of Argriculture's evaluation of those competing interests special deference because there is no one 'correct' balance to be struck.

Moreover, while the government acknowledges a "moral obligation" (Brief at 33) to deal fairly with Indians, it denies that Indians have any right to constitutional protection for their religious beliefs. For the government, there is no Bill of Rights, just a Bill of Moral Obligations, to be superceded whenever the government has some interest



in the subject matter and chooses a 'reasonable' course of action (Brief at 41).

These submissions are a marked and sharp break from the principles underlying the Bill of Rights as enunciated in this Court's cases. Freedom of worship has a special claim upon government; it is a claim of right, not of grace; it does not depend on the good will of the political branches or exist at the discretion of the Department of Agriculture. Any interference with that right places an especially heavy burden on government to justify.

B. The Compelling Interest Test  
Should Not Be Modified In  
Property Management Cases

i. The Government Does Not Have  
A Compelling Interest In  
Insulating Its Processes  
From Judicial Review

The government does not argue that it has a compelling interest in the Chimney Rock Road as the term is

ordinarily used in constitutional litigation. Instead, it argues that it has a compelling interest in being able to manage public lands freely without having to give undue weight to any particular proposal for the use of the land and without being subject to exacting scrutiny in the courts (Brief at 37-49). The compelling interest asserted is not in any particular result, but in the autonomy of the process, and its insulation from meaningful judicial review.

The government cites several cases (Brief at 38) for the proposition that the "expressed will of Congress" is to accept land use decisions which emerge from the administrative processes. Those cases, however, stand only for the proposition that, in choosing among the statutory purposes to which public lands

may be put, the balance struck by the Executive Branch is to be accorded nearly total deference. Nothing in any of the statutes or cases cited suggests that Congress conferred upon the Executive the ultimate authority over Free Exercise claims, and such a directive should not be inferred absent the clearest congressional command, cf. Bowen v. Michigan Academy, 106 S.Ct. 2133, 2141, n.12 (1986). No such command exists in the cited statutes.

The courts are not step-children of the Constitution, inferior in all respects to the executive or legislative branches. As is the case with both the executive and legislative branches, they are confined to a particular sphere of competence; but within that sphere, they are no less competent than the other branches. On the contrary, on matters within their special province, it is they



who have special competence, and to whom the other branches must defer.

As James Madison stated in urging the adoption of a Bill of Rights:

If [rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

I Annals of Congress 139 (1789).

The government does not and cannot explain why the responsibilities of the Department of Agriculture are more onerous, or require consideration of more interests, than that of any other government body, be it an educational body charged with the education of future citizens, Wisconsin v. Yoder, supra, an

unemployment insurance board, Hobbie v. Unemployment Appeals Bd., supra, or the welfare bureaucracy, Bowen v. Roy, supra. Surely, National Forests are not "total environments", E. Goffmann, Asylums: Essays Upon the Social Situation of Mental Patients and Other Inmates (1961), of the type which led this Court, over strong dissent, in cases involving prisons, O'Lone v. Shabazz, 107 S.Ct 2400 (1987) and the military, Goldman v. Weinberger, 106 S.Ct (1986), to accept an unusually high degree of deference to executive decision making.

ii. This Court Should Not Modify  
The Compelling Interest Test

The government insists that the compelling interest test is satisfied by the government's interest in managing public lands coupled with a showing of "reasonableness" in the actual choice made (Brief at 41). The stringency of

the test is further reduced because the government claims that whether a particular use is arbitrary must be assessed against the right of the United States to use its property as it sees fit (Brief at 39). By relying on these arguments, the government indirectly concedes that Petitioners' cannot justify its decision to build a road between Gaston and Orleans under the traditional compelling interest standard.<sup>18</sup>

Many things are wrong with the government's proposed analysis. To argue

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<sup>18</sup> This implicit concession, similar to one made in the Court of Appeals, (14a) pretermits the need for discussion of the correctness of the factual findings of the two lower courts on this score. The government attempts to relitigate the facts under the guise of assessing the reasonableness of the decision to build the Chimney Rock Road, making assertions (Brief at 42) which run contrary to the facts as found by the lower courts. (15a, 66a-67). The government should not be so easily allowed to circumvent the factual findings below or the 'two court' rule. Goodman v. Lukens Steel Co., 107 S.Ct 2617, 2623 (1987).



that the authority conferred by the Property Clause, Art. IV, §3 cl.2, cf. New Mexico v. Kleppe, 426 U.S. 509 (1976), on the government to manage its property compels a narrower role for the First Amendment, as manifested in a lower standard of review, stands constitutional history on its head. It is an astounding argument for the Constitution's bicentennial year.<sup>19</sup>

Federalists opposed a constitutional provision protecting religious freedom on the ground that, as Madison put it, "there is not a shadow of right in the

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<sup>19</sup> Not only has this Court not deferred to the executive in weighing First Amendment claims, but, in derogation of ordinary principles of appellate review, it itself evaluates the strength of factual claims in First Amendment cases to ensure that proper regard is paid to these fundamental liberties, Bose, Inc. v. Consumers Union, 466 U.S. 485 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916, n.50 (1982).

general government to intermeddle with religion." III J. Elliot, The Debates in the Several State Conventions, (1836) p. 330<sup>20</sup> See also IV J. Elliot, supra, at 194; (James Iredell); id. at 208 (Richard Spaight).

Proponents of a Bill of Rights successfully argued that the national government could abuse its enumerated powers, including the power to tax or define crimes (and, they could have added the right to manage public property), so as to regulate religion. H.J. Storing, Anti-Federalists, supra, at pp. 65-66;

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<sup>20</sup> See also T.J. Curry, The First Freedoms: Church & State in America to the Passage of the First Amendment (1986) 193-206; L. Levy, The Establishment Clause: Religion and the First Amendment (1986) 63-73; H.J. Storing, What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution (1981) ch.8 (hereafter Anti-Federalists); J. Story, Commentaries on the Constitution (Rotunda & Nowak ed. 1987) §978; A. Hamilton, The Federalist No. 84.

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Griswold v. Conn., 381 U.S. 479, 488-90  
(1965) (Goldberg, J., concurring).

The government inverts history. It would limit the reach of the Bill of Rights in order to allow full scope to the original Constitution, notwithstanding the 'original intent' that the Bill of Rights limit the scope of all Governmental powers granted by the Constitution.

C. No Different Result Is Required  
Because Government Owns The  
Property in Question

The government is reduced to arguing that it, like any other property owner, may "preserve the property under its control for the uses to which it is lawfully dedicated," (Brief at 38-39) citing, inter alia, Cornelius v. NAACP Legal Defense and Educ. Fund., 473 U.S. 788, 800 (1985). But the government is not just an ordinary land owner; it cannot deny access to its holdings for



reasons that are violative of the Constitution, Southeastern Productions v. Conrad, 420 U.S. 546, 555 (1975); Hague v. CIO, 307 U.S. 496 (1939); cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Indeed, prior to the decision in Hague, property concepts governed a speaker's access to parks and sidewalks, Davis v. Mass., 167 U.S. 43 (1891). The Davis property approach has been discredited and overruled in all-but-form by dozens of this Court's decisions. There is no reason to resurrect that approach in this case.

In the non-public forum cases, this Court has emphasized the property rights of the government in applying a reasonableness standard to denials of access. But the government fails to note that in cases such as Cornelius, supra, or Greer v. Spock, 424 U.S. 828 (1976),

the government's interest is arrayed not against the right to speak as such, but against an incremental benefit in the effectiveness of speech at a particular location. That is not an insubstantial interest, as amicus argue in Boos v. Barry, #86-803, but it is not of the same magnitude as the destruction of one's religious holy places.

Moreover, in cases like Cornelius, supra, or Adderly v. Florida, 385 U.S. 39 (1967) the speaker sought to engage in conduct which would be inconsistent with the ordinary use of the property, for example, an office or a jail. Here, respondents' proposed use is far more consistent with the permissible uses of the surrounding wilderness area than is the government's proposed use.

D. The Government's Argument Cannot  
Be Limited To The Property  
Clause

Although the government purports to limit its modified "compelling interest" test to the Property Clause, its argument for a modified compelling interest test cannot be so easily cabined. The federal government must always act under some enumerated power, and therefore would always be in a position to assert a similar argument. The states, for their part, have the police power to protect the well being of their citizens, and could, as well, make 'important interest' plus reasonableness claims.

Indeed, they have done just that. For example, in Wisconsin v. Yoder, supra, the state argued that it had a compelling interest in creating an educated citizenry. Uniform enforcement of the compulsory education requirement



at issue in that case was, from the state's point of view, surely a reasonable means of achieving that end. This Court nonetheless ruled for the Amish, finding that the state's general interest in an informed citizenry was not, at the margins, sufficient to justify a refusal to exempt Amish children from the requirement.

The government points to various aspects of the regulation of property said to make the Property Clause unique. In particular, it claims that decisions about the use of property constitute a 'zero sum' game, and must be subject to a different rule. Brief at 37.

There are several responses to this argument. First, even if the Property Clause were the only 'zero sum' game in the Constitution, the First Amendment applies with full force to each of the enumerated powers, Reid v. Covert, 354

U.S. 1, 5, 6 (1957). Of course, some governmental interests are more important than others, or less amenable to the carving out of exemptions, and will more readily satisfy the compelling interest test than others. But that does not justify adoption of various standards to evaluate or weigh the significance of the government's interest in overriding a Free Exercise claim.

Second, the suggestion that land use decisions are a 'zero sum' game and hence cannot be subject to the compelling interest test is simply wrong. If the Chimney Rock Road between Gaston and Orleans is not built, there may well be other places to build a road. Indeed, had the Forest Service been more sensitive to the rights of Native Americans in the past it would have built roads elsewhere in the Six Rivers National Forest, obviating the need for the

Chimney Rock section. Had that occurred, this case would not have been necessary.<sup>21</sup>

More broadly, as Judge Bork has written, Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501, 508 (D.C. Cir. 1986), all resources are scarce. If unemployment benefits are paid to Ms. Sherbert or Mr. Thomas, those payments must come from somewhere. When Ms. Jennison was excused from jury duty, someone else was required to serve, In Re Jennison, 365 U.S. 14 (1963). Perhaps decisions about land use are zero sum games in a more immediate sense than those other cases, but the difference is one of degree, not kind.

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<sup>21</sup> Moreover, any costs that accrue to the government as a result of the judgment appealed from (costs the lower courts described as either de minimis or speculative) will be offset not only by the gain of religious liberty, but by the enhancement of the wilderness area surrounding the proposed route.



E. The Free Exercise Clause  
Protects Substantive Rights

The government's arguments can be understood as advocating a procedural approach to the Free Exercise Clause-- that is, that it requires only that government consider what impact its actions will have on religious practices. Although he is not cited by name, this approach to constitutional law resembles Dean John Hart Ely's process-based approach to constitutional rights, J.H. Ely, Democracy and Distrust, (1980) p. 100-01:

The Constitution has...sought to assure that...a majority not systematically treat others less well than it treats itself--by structuring decision-making at all levels to try to ensure first, that everyone's interest will be be...represented...at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the

sort of discrimination that  
is impermissible in theory.

Dean Ely's thesis that the Constitution's broad phrases are satisfied by fair procedures and rational choices has not been accepted by this Court.<sup>22</sup> In any event, Dean Ely's position lends no support to the government for he plainly contemplates fair process, not a charade. In this case, however, there was at most the semblance of fair process, not the reality.

The laws of the United States require consultation with the Advisory Council on Historic Preservation before major projects are undertaken, 42 U.S.C. §470 et seq. That was done. The Council's recommendation that the Chimney Rock section not be built, J.A. 201-05, was ignored.

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<sup>22</sup> See Appendix A for a list of this Court's citations to Dean Ely's book. In none did this Court accept his proffered refocusing of constitutional law.

Pursuant to AIRFA, 42 U.S.C. §1996, the government hired prominent ethnographers to study the impact of the road on Native American religious practices. Their recommendation that the road not be built, but for a few ineffectual cosmetic changes, likewise was ignored.

Having received this report, but not liking its results, the government conducted a referendum in Del Norte county (Brief at 6, n.4) to determine whether a majority of the citizens of the area wished to forgo the road in deference to the constitutional rights of Native Americans. It now relies on the wholly predictable results of that referendum to justify its pre-ordained decision.

As further indication that the process here did not fairly weigh the free exercise rights of Native Americans against its other interests, the



government has insisted on building the road based on its original weighing of its interests against those of respondents, even though the major justification for building the road-- providing an infra-structure for logging operations (Brief at 5)--has been removed by the Act of Congress setting aside most of the area as wilderness. Indeed, Congress adopted the ban in large part to protect the Native American religious sites: the government's attempt to build this road would thwart that purpose.

This is not fair process; this is not a fair balancing of competing concerns by the Forest Service. It is not a "textbook example" (Brief at 36) of government's willingness to consider, and attempt to accommodate, Native American religious practices. Rather, having decided upon a course of action, the government is determined not to let

constitutional niceties or changing realities stand in its way.

F. The Free Exercise Clause Places  
A Thumb on the Balance

The government's most fundamental error is that it does not accord the Free Exercise Clause any special weight in the weighing of competing interests. It suggests that all the Constitution requires in the public land context is a demonstration that consideration was given to competing interests. As the government points out (Brief at 35-36), that standard is akin to the preparation of an environmental impact statute under the National Environmental Protection Act, 42 U.S.C. 4332(2)(c), which requires consideration of the environmental impact of major federal projects, but which gives no special weight to environmental factors, Vt. Yankee Nuclear Power v. N.R.C., 435

U.S. 519, 588 (1978); Druid Hills Civic Ass'n v. F.H.A., 772 F.2d 700 (11th Cir. 1985).

The government's argument, however, undervalues the First Amendment. The unweighted consideration of constitutionally protected interests, as Justice O'Connor observed in Bowen v. Roy, 106 S.Ct. 2147, 2166 (1986)<sup>23</sup>, has "no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny...."

The concern that the compelling interest standard is not sufficiently deferential to the Forest Services' balancing of its many responsibilities is nothing more than a plea for the Court to give "overriding weight to the unanchored

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<sup>23</sup> Although not commanding a majority in Bowen, Justice O'Connor's views were ratified by a majority of the Court in Hobbie v. Unemployment Appeals Comm'n., supra, 107 S.Ct. at 1050, n.7.



anxieties of the [Forest Service] bureaucracy" Id. at 2168.

Those who drafted the Free Exercise Clause balanced governmental interests, including inter alia, economic ones, against Free Exercise concerns and resolved them, in a general sense, in favor of Free Exercise.<sup>24</sup> As Professor Kalven so aptly put it, the First Amendment put a thumb on the judicial scales in favor of the

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<sup>24</sup> See, Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987); Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U.L. Rev. 299 (1986); Henkin, Infallibility Under Law: Constitutional Balancing, 78 Col. L. Rev. 1022 (1978).

Criticism of balancing is not new, see Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962); Fried, Two Concepts of Interests: Some Reflections On The Supreme Court's Balancing Test (1963).

We do not enter the broader debate. It suffices for present purposes to note that, in the Free Exercise area, balancing in some form is indispensable if the Clause is to protect conduct.

individual. The balance struck in any individual case must respect the Founders' original intent to tip the balance in favor of conscience. See Fried, supra, Two Concepts, 73 Harv. at 773; Frantz, In The Balance, supra, 71 Yale L.J. at 1445.

Freedom of religion is protected by the Constitution not because its economic value to believers exceeds the economic value of conflicting governmental interests, but because the Founders recognized that:

The Religion...of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right...This duty is precedent both in order of time and degree of obligation, to the claims of civil society.

J. Madison, Memorial and Remonstrance  
Against Religious Assessments<sup>25</sup>

This is not to say that economic interests, such as those asserted here by the government, can never supersede Free Exercise claims. This Court has at least twice so indicated, U.S. v. Lee, supra, 455 U.S. at 260; Sherbert v. Verner, 374 U.S. at 407. However, Free Exercise rights are to take precedence over economic interests (or other governmental interests) except in the unusual case where they are outweighed by interests of the highest order, unattainable in other

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<sup>25</sup> Professor Tribe has powerfully stated the objection to a purely economic calculus in Constitutional Calculus: Equal Justice or Economic Efficiency, 98 Harv.L.Rev. 592, 596 (1985): "The appeal of utilitarian policy analysis, as well as its power, lies in its ability to reduce the various dimensions of a problem to a common denominator. The inevitable result is not only that "soft" variables--such as the value of vindicating a fundamental right or preserving human dignity--tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character."



ways, Wisconsin v. Yoder, supra, 406 U.S. at 215; cf. Wygant v. Jackson, 106 S.Ct. 1842, 1850, n.6 (1986).

It would be particularly inappropriate to give overwhelming weight to the economic interests asserted by the government in this case because those very interests, when asserted in opposition to the decision to designate the Six River National Forest as wilderness, were rejected by the Congress, in part, it bears repeating, to protect respondents' religious rights.<sup>26</sup>

The level of justification required before government may infringe on private rights, is chosen according to the seriousness of errors of a particular sort, or as Justice Harlan put it in a related context, "the comparative social disutility of each."

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<sup>26</sup> See H.R. Rep. 98-40, 98th Cong. 1st Sess. 57-61 (minority views): S.Rep. 98-582, 98th Cong. 2d Sess. (letter of John Block, Secretary of Agriculture).

In Re Winship, 397 U.S. 358, 371 (1970).

The comparative social disutility of most decisions about the uses of public land, such as erroneously favoring recreation over logging in a national forest, is slight enough so that the Administrative Procedure Act reasonableness standard is a sufficient check on arbitrary government action. By contrast, the social disutility of erroneous denials of free exercise rights in favor of recreational or economic uses is far greater, such that application of the compelling interest standard is required.

Conclusion

For the reasons stated, the judgment should be affirmed.

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## APPENDIX



Appendix A

Anderson v. Celebrazze,  
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466 U.S. 14 (1980)

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473 U.S. 432 (1985)

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488 U.S. 607 (1980)

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448 U.S. 555 (1980)

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465 U.S. 208 (1984)

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**AMICUS CURIAE**

**BRIEF**

No. 86-1013

Supreme Court, U.S.  
**FILED**

OCT 22 1987

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

RICHARD E. LYNG,  
SECRETARY OF AGRICULTURE, *et al.*,  
*Petitioners*  
v.

NORTHWEST INDIAN CEMETERY  
PROTECTIVE ASSOCIATION, *et al.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

BRIEF OF THE CHRISTIAN LEGAL SOCIETY,  
AMERICAN JEWISH COMMITTEE,  
AND CONCERNED WOMEN FOR AMERICA  
AS AMICI CURIAE SUPPORTING RESPONDENTS

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### QUESTIONS PRESENTED

Whether government development of public lands that are sites sacred to Native American religious practice of hundreds of years, "burdens" the rights of Native Americans to the free exercise of religion, within the meaning of the First Amendment.

Whether such a burden on Native American religious exercise is justified by a state interest sufficiently compelling to justify the infringement on religious liberty.

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**BRIEF OF THE CHRISTIAN LEGAL SOCIETY,  
THE AMERICAN JEWISH COMMITTEE,  
AND CONCERNED WOMEN FOR AMERICA  
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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**INTEREST OF THE AMICI CURIAE**

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Chris-

tian Legal Society, founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the civil and religious rights of Jews will be secure only when the civil rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and government, which is encapsulated in both the Establishment Clause and the Free Exercise Clause. One corollary of this principle is that only when justified by the compelling interests of society may the state bar a faith group from carrying out a practice dictated by its religious beliefs. Such compelling interests, we believe, are not present in the case at bar.

Concerned Women for America (CWA) is a national non-profit women's organization that works through education, lobbying and litigation to promote religious liberty and traditional moral values. CWA, based in Washington, D.C., has over 560,000 members nationwide.

### INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a classic question of free exercise jurisprudence: whether government may destroy or seriously undermine the religious value of sites currently used for worship by Native Americans, absent a compelling interest in the destruction. Put simply, the issue is the right of traditional site-specific religious practices to the constitutional protection already accorded to more mainstream beliefs.

The fact that this case involves Native American religions is significant: much of free exercise doctrine has been developed in cases that involved religious interests unrelated to any one situs. Site-specific worship by Native Americans is essential to the preservation of native religions. Unlike Judaism and Christianity, Native American religions generally associate spiritual power and immediacy with particular sites: worship and communication with spirits may take place *only* at those sacred sites. Destruction of a sacred site, therefore, is a cataclysmic event for a group of adherents such as respondents, whose entire religion is inextricably tied to the high country they seek to protect from development that will be disastrous to their beliefs and practices. Although suits seeking exemptions from otherwise valid regulations, such as school attendance requirements, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or compulsory flag salutes, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), involve requests for relief from infringements of beliefs that regulate behavior, such cases do not limit the ambit of the free exercise clause to "coerced" actions. Native Americans seek exemptions from development plans that infringe as deeply upon their religious way of life as school attendance laws do upon the Amish, and compulsory flag salutes upon Jehovah's Witnesses.

It is essential to recognize that as the religious context changes, the constitutional analysis must account for

the differences in theology and practice among religions. The free exercise clause mandates judicial recognition of the momentous religious interests at stake in suits, such as this one, that seek to preserve the right to meaningful worship for American Indians. This recognition requires that the legal analysis employed by the Court reflect the site-specificity of the religious claim. Once the analysis has properly accounted for the Native American religious context, the traditional free exercise balancing test applies: the government must demonstrate that a compelling state interest, carried out by the least restrictive means available under the circumstances, justifies the infringement of Native American beliefs. As the brief submitted by the Solicitor General appears to concede by its contention that a reasonableness standard should apply, the government has failed to show that it has a compelling interest in logging and paving a six-mile stretch of road in a remote wilderness area, much of which already has been protected from development by congressional action.

Further, although the theology and practice of Native American religions differs from the religious interests at stake in many free exercise cases, limitations on government control of public lands have long been recognized in the public forum doctrine. Like other forms of first amendment activity that traditionally have taken place in public fora, Native American rituals and quests have been held at sacred sites "from time out of mind." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In the classic public forum, such as the public lands at issue here, the government must demonstrate a compelling interest in development that infringes first amendment rights.

## ARGUMENT

### I. GOVERNMENT DEVELOPMENT OF SACRED SITES INFRINGES THE FREE EXERCISE RIGHTS OF NATIVE AMERICANS.

#### A. The Role of Holy Places is Fundamental to Native American Worship and Belief.

The Judeo-Christian concept of a supreme and immortal deity, belief in whom may be divorced from any specific situs, is not applicable to many Native American religions, which view gods, people and nature as an integral whole. In this view of the universe, spiritual and physical reality converge in certain natural phenomena or locations. A. Hultkrantz, *Belief and Worship in Native North America* 126 (C. Vescey ed. 1981). In many American Indian religions, therefore, transcendent reality is not immune to destructive physical forces. See generally Momaday, "Native American Attitudes to the Environment," in *Seeing With a Native Eye: Essays on Native American Religion* 79, 81 (W. Capps ed. 1976). In Native American belief, the place where an event occurred, rather than the event itself, assumes special spiritual significance. As a result, Native American worship focuses not so much on revelatory events or texts, but on spiritual renewal through ceremonies and individual relationships with holy places. Federal Agencies Task Force, American Indian Religious Freedom Act Report 10 (1979) ("The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must . . . be performed at the place and in the manner designated."). See also Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447, 1448-53 (1985); P. Matthiessen, *Indian Country* (1984).

The necessity of communicating with spirits through certain locations makes the destruction of a Native American sacred site a cataclysmic event. This emphasis on the sanctity of a particular location distinguishes Native



Americans from Jewish and Christian Americans, for whom the enforced preservation of particular sites may pose substantial free exercise problems. Cf. Note, *Land Use Regulation and the Free Exercise Clause*, 84 Colum. L. Rev. 1562 (1984). Even for Judaism and Christianity, however, some locations may be infused with such profound religious meaning and history that the preservation of such locations is of great importance to their adherents. These distant sites generally are located in the Middle East, and may seem somehow more genuinely "religious" than a Native American site in the United States. In Israel, such places and access to them are protected by the Holy Places Law. 5727-1967, 21 L.S.I. 76 (1967). See also I. England, *Religious Law in the Israel Legal System* 60 (1975). Indeed, the United States has stressed in its dealings with Israel that the protection of the spiritual "special interest of three great religions in the holy places of Jerusalem" is vital to its relations with Israel. 57 Department of State Bulletin 33 (1967), quoted in Jones, *The Status of Jerusalem: Some National and International Aspects*, 33 Law & Contemp. Probs. 169, 172 (1968).<sup>1</sup>

#### B. The Free Exercise Clause Protects Site-Specific Worship.

Recognition of the site-specificity of Native American religions is essential to the constitutional protection of long-standing, deeply held Indian beliefs. While free ex-

<sup>1</sup> Representative Morris Udall drew the parallel between Native American sacred sites and sites in the Middle East in a debate prior to the enactment of the American Indian Religious Freedom Act, *infra*:

For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand this? Our religions have their Jerusalems, Mt. Calvarys, Vaticans and Meccas. We hold sacred Bethel, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these sites.

124 Cong. Rec. 21,444 (1978).

ercise analysis often focuses on "acts of conscience," rather than objects of belief, see, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981), it is imperative that this Court recognize the free exercise implications of a government action that may destroy the very ability to practice a vital, on-going religion. If the state may undermine the religion itself with no constitutional protection for the Native American interests at stake, then the free exercise clause would have been limited to encompass only mainstream, monotheistic religions.<sup>2</sup> This result is surely not consistent with our con-

<sup>2</sup> The government attempts to argue that the Native American religious groups have sought "their own individualized benefit program . . . ." Brief for Petitioner at 31. The same could be said of the religious individuals who sought unemployment insurance in *Sherbert*, *Thomas* and *Hobbie*: each of them sought an exemption from an otherwise valid requirement, and the result of the exemption was increased governmental costs. Such an exemption does not "amount to a request that the government subsidize their religious practices," as the government claims. More accurately, the request for an exemption from development asks government to refrain from destroying the religion of many Native worshipers. The request does not seek affirmative support for native religious practices, such as financial support for native religious practices, or free transportation to sacred sites. Virtually all exemptions granted on free exercise grounds involve increased governmental costs: from unemployment insurance payments to processing costs for conscientious objectors to military conscription, accommodations of free exercise necessitate expenditures. The mere fact that there may be some cost associated with satisfaction of free exercise requirements, therefore, does not transform an exemption into a "subsidy." Further, although we take no position here on the proper disposition of *Oregon Department of Human Resources v. Smith*, No. 86-946, it is important to distinguish this case from an arguably valid occupational qualification, which may necessitate abstention by an employee from otherwise protected religious ceremonies. We would point out, however, that it is not the alleged criminality of peyote use that is central to the analysis, since it appears certain that the employer would have objected as strenuously to celebration of the Christian eucharist with wine, as to the use of peyote in a Native American ceremony.

stitutional system, which is designed to protect the religious liberty of all Americans, whether or not their beliefs are similar to the majority. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Some district courts have been reluctant to acknowledge that a sense of spiritual immediacy and awe for places that have witnessed momentous religious events, far more profound even than that felt by many Jews and Christians only in the "Holy Land," play a fundamental role in Indian religion, and have held that the lack of a legal property interest in a sacred site on public land precludes free exercise relief. See, e.g., *Sequoyah v. TVA*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980) ("Since plaintiffs have no legal property interest in the land in question, . . . a free exercise claim is not stated here"); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (same).

Yet every Court of Appeals that has considered whether Native American sacred sites are protected by the free exercise clause, even those that have denied site-specific claims, has acknowledged that the free exercise clause is applicable to public lands. Although finding that the tribal plaintiffs had failed to show a burden on their religious practices the District of Columbia Circuit in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), specifically held that the free exercise clause may sometimes supersede government's land-management plans:

The government must manage its land in accordance with the Constitution . . . , which nowhere suggests that the Free Exercise Clause is inapplicable to government land. This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis. In holding that government land uses can never burden the right to freedom of belief, and can burden the right to freedom of prac-

tice only if site-specific religious practices are significantly impaired, we pay due regard to the government's rights and duties in its land. However, we see no basis for completely exempting government land use from the Free Exercise Clause.

708 F.2d at 744 n.5. See also *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980) ("The government must manage its property in a manner that does not offend the Constitution."); *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980) (government's ownership of public property does not preclude free exercise claim).<sup>3</sup>

As the district court in *United States v. Means*, 627 F. Supp. 247, 257 (D.S.D. 1985) said, the issue is not ownership, but the existence of a governmentally-imposed burden on religious exercise: "[The refusal by the forest service to grant a special use permit for the conduct of religious ceremonies] presents the classic First Amendment problem of whether there is a denial of the free exercise of religion when a government regulation, whose purpose is concededly nonreligious, either makes illegal, or otherwise burdens, conduct which is dictated by some religious belief." The burden on Native American religious practices in *Means*, as in this case, was caused by application of otherwise valid, neutral Forest Service regulations, in a manner that interfered with essential religious worship. Because the refusal to grant an exemption to the Native American plaintiffs in *Means* was not based on a compelling state interest, the court held

<sup>3</sup> Even Judge Beezer's partial dissent from the decision below, stressed that

It is now well settled . . . that Indians have standing to raise first amendment objections to the development of public land . . . . The district court properly concluded that the Indian plaintiffs have a first amendment interest in the high country . . . . [However], to qualify for first amendment protection, the plaintiffs' use of the high country must be "religious."

795 F.2d at 701 n.2 (Beezer, J., dissenting in part).



that the denial was an unjustified infringement of their free exercise rights.

As in *Means*, the question presented here falls squarely within the ambit of the free exercise clause. Failure to recognize the religious interest of the Native American groups that worship in the high country is tantamount to failure to protect site-specific religions. Yet the Solicitor General has proposed a test that would remove all development, no matter how drastically development would affect the religious exercises that take place at sacred sites, from free exercise clause analysis.

In an unprecedented and dangerous argument, the Solicitor General urges this Court to apply the free exercise clause only in cases that involve compulsory behavior. Because the government has not directly required or prohibited the religious practices of Native American groups at sacred sites, this argument runs, the development of the sites does not burden their religious practice. The absurdity of this argument is demonstrated by the realization that the actual *destruction* of an otherwise vital and successful religion would be insulated from all constitutional review.

Clearly, this attempted narrowing of the constitutional guarantee of religious liberty is flawed. The free exercise clause protects individuals and institutions against *burdens* placed on religion by government. See, e.g., *Wisconsin v. Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may . . . nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Cantwell v. Connecticut*, 310 U.S. at 304 ("In every case the power to regulate must be exercised so as not, in attaining a permissible end, to unduly infringe the protected freedom."). The fact that infringements of religious exercise often take the form of compelled behavior that violates religious belief, e.g., *West Virginia Bd. of Educ. v. Barnette*,

*supra* (compulsory flag-salute), does not reduce the ambit of the free exercise clause to a mere protection against compulsory or prohibited behavior, as the government repeatedly argues. In *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), for example, the Court invalidated a New York law that altered the governing structure of the Russian Orthodox Church as an infringement of free exercise. In dissent, Justice Jackson made the same argument that the government attempts here:

[New York state] has only held that this cleric may not have a particular Cathedral, which, under New York law, belongs to others. It has not interfered with his or anyone's exercise of his religion. New York has not outlawed the Soviet-controlled sect nor forbidden it to exercise its authority or teach its dogma . . . .

344 U.S. at 130 (Jackson, J., dissenting).

But the free exercise clause, contrary to Justice Jackson's position, protects against infringements of religion by government, rather than against only one form of burden, that of coercion. Thus, while the existence of regulations that require (or prohibit) behavior that is contrary to (or mandated by) religious beliefs certainly states a free exercise claim, it does not encompass all possible free exercise interests protected by the Constitution.

Stated differently, the interference with religious exercise contemplated by the government here constitutes the same degree of indirect, yet powerful, pressure to conform that was involved in *Sherbert, Thomas* and *Hobbie*. In those cases, unemployment compensation was conditioned on behavior that was inconsistent with fundamental religious beliefs. Individual citizens were put to the choice of abandoning their beliefs or foregoing government benefits. In the case of destruction or impairment of sacred sites, an entire body of religious adherents is



forced to alter drastically their religious practices, or to forego their religious exercise altogether.

In either case, government has burdened significantly religious worship, thereby violating the free exercise rights of religious individuals, unless a compelling state interest justifies the infringement. The fact that a sacred site, rather than sabbatarian observance, is the object of the burden, merely highlights religious plurality of the American people. It does not affect the existence of a constitutionally cognizable burden, or the level of interest the government must show in the infringement to overcome the presumption in favor of exempting the sacred site from development. This case, like *Sherbert, Thomas*, and *Hobbie*, is at the heart of our free exercise jurisprudence: the protection of religious minorities from governmental pressure to conform to the mainstream is central to the pluralism that the free exercise clause safeguards.

The existence of a burden on religious exercise is not a matter of dispute. The government openly concedes, "the government actions at issue here infringe upon important elements of [Native American] religious beliefs." Brief for Petitioner at 21. Since the free exercise clause guarantees the freedom to worship whenever a compelling state interest does not overbalance the individual interest in religious exercise, it is clear that a free exercise claim is stated here. The attempt to subsume all infringements under a "coercion" requirement must fail.

Congress, responding to the concerns of Native Americans regarding site-specific religions, enacted the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1982), to "insure that the policies and procedures of various federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the

free exercise of religion." 1978 *U.S. Code Cong. & Ad. News* 1262. The Act, while it may not provide for greater protection than that contained in the free exercise clause, is a formal congressional acknowledgement that government action on public lands does infringe Native American beliefs and practices, and that Indian religions must be accorded meaningful protection in ways not generally necessary for protection of more "mainstream" religious interests.

The court below correctly assessed the role of the sacred sites to the Native American tribes that use the area:

There is a great deal of evidence in the record that the high country is indispensable to a significant number of Indian healers and religious leaders as a place where they receive the "power" that permits them to fill the religious roles that are central to the traditional religions. There is abundant evidence that the unitary pristine nature of the high country is essential to this religious use. Finally, there is much evidence that the religious lives of many other Indians depend upon the services of those leaders who have received the necessary "power" in the high country. On all these points, there is virtually no evidence to the contrary.

795 F.2d at 692 (footnote omitted).

Clearly, the tribes that use the high country have shown that their religious beliefs and practices will be substantially infringed if development of the area is permitted. Their religious worship, which takes place regularly in the high country, is directly threatened by the proposed development.

## II. NO COMPELLING STATE INTEREST JUSTIFIES BURDENING NATIVE AMERICAN RELIGIOUS PRACTICES.

Once it has been established that the development of the high country infringes the rights of the tribes that worship there, the government must show that a com-

elling state interest, narrowly tailored to accomplish the objective in the least restrictive means possible, justifies the infringement. *Sherbert v. Verner*, 374 U.S. 398 (1963). As this Court held in *Wisconsin v. Yoder*, 406 U.S. at 215:

[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Given that "logging and the construction of logging roads would be utterly inconsistent with the Indians' practices," 795 F.2d at 692, the government must demonstrate that its interest in the development of this particular site is so overwhelming that it outweighs the virtual destruction of the tribes' ability to practice their religion. 795 F.2d at 693. ("[T]he proposed government operations would destroy the plaintiff Indians' ability to practice their religion.")

As the government's brief appears to concede by its strenuous argument for application of a lesser "reasonableness" standard, there is no compelling interest in the development. As originally proposed, the logging operations and road construction would have permitted timber harvesting throughout the high country. While this litigation was pending, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984), removing much of the area from potential development. Nonetheless, a portion of the originally planned logging operation, and a six-mile stretch of road, remain as a threat to Native American practices. Thus, while the government's potential benefit from the development has been reduced sharply by the exemption of a major portion of its targeted logging area, the threatened harm to the Native American religious groups is as ominous as ever.

The fact that the potential infringement is so drastic, coupled with the reduction in available timber for har-

vesting brought about by the California Wilderness Act, demonstrates that any state interest in implementing the development is overbalanced by the free exercise interests of Native American worshipers.

In a further attempt to downplay the free exercise rights of native religious groups, the government argues strenuously that this case is similar analytically to the Native American religious claim made in *Bowen v. Roy*, 106 S.Ct. 2147 (1986). Even a brief review of the facts of *Roy* reveals that this argument is untenable. The plaintiff in *Roy* claimed that he should be able to prevent use of his daughter's already-existing social security number, because the existence and use of such a number would jeopardize her spiritual welfare. Chief Justice Burger's plurality opinion represented a majority on the question whether the plaintiff had a free exercise right to enjoin use of the number. In holding that he did not, the Court stressed that Roy did not have the right to require "Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 106 S. Ct. at 2152.

Two fundamental differences in the facts of this case distinguish it from *Roy*. First, it is clear that development will interfere directly with regularly-held Native American religious rituals conducted in the high country. In *Roy*, the use of the social security number for internal auditing and processing purposes only, presented no such stark infringement of actual religious practice. Second, the strictly intra-governmental nature of the use at issue in *Roy* presents a contrast to the public nature of the development of land to which the public has access. 795 F.2d at 695.

Thus, while it is true that a religious adherent may not restructure government to suit his spiritual convictions, it is also true that governmental interference with religious exercise, such as the rituals and pilgrimages at



issue here, must be justified by a compelling state interest. As this Court held recently in *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1049 (1987), even when government is providing a benefit, it may not condition receipt of that benefit on an infringement of the recipient's religious beliefs and practices, unless a compelling state interest justifies the infringement. *Hobbie* explicitly rejected a reasonableness argument similar to the one made by the government in this case. Facial neutrality and a legitimate public interest do not satisfy the requirements of the free exercise clause. In its dealings with the beneficiaries of an unemployment compensation program, as opposed to genuinely internal procedures, the government still must satisfy the compelling state interest/least restrictive means test.

Similarly, when a governmental program is held on land to which the public has access, just as when it is related to benefits available to all who qualify, the nature of the activity ceases to be "internal." After all, the commands of the first amendment are addressed expressly to government, and it is to governmental activities that affect the interests of individuals and groups that the free exercise clause applies. Pushed to an unwarranted extreme, the language of *Roy* could be read to preclude relief for any activity that was characterized self-servingly by the government as "internal." In fact, the holding of *Roy*, and the subsequent clarification of *Roy* in *Hobbie*, demonstrate that, in its dealings with the public, such as on public lands and in the distribution of unemployment benefits, the compelling state interest/least restrictive means test applies. Once the government invites the public onto its property, it must respect the free exercise rights of those who use the area. Just as in *Hobbie*, *Thomas* and *Sherbert*, the government here, even if it may not be constitutionally compelled to open its wilderness areas to the public, may be required to conform its use of the property to constitutional mandates once it has allowed access.

### III. THE PUBLIC FORUM DOCTRINE PROVIDES A USEFUL ANALOGY TO ANALYSIS OF NATIVE AMERICAN FREE EXERCISE CLAIMS TO PROTECT SACRED SITES.

As noted earlier, free exercise claims typically are framed in terms of an individual's right to exemption from a statute regulating conduct, rather than seeking protection of a sacred site. See *supra*, 6-7. The fact that the requested relief is different, however, reflects a difference in theology, rather than a less compelling religious claim. Much like the free exercise plaintiffs whose beliefs spring from the Jewish and Christian traditions, Native American religious groups seek exemption from generally applicable regulations. They do not, for example, ask government to conform its behavior to be consistent with their beliefs; they merely ask that certain sites, because of their unique religious significance, be exempted from otherwise valid and neutral development plans. The overwhelming majority of such plans would be of no concern to Native American religions; they seek exemptions only for those sites of central importance, where no compelling state interest justifies development. The Native American religious interest is in preservation of sacred sites, rather than in the invalidation of proposed development of all public lands. This exemption should be distinguished from a subsidy; contrary to the Solicitor General's argument, the plaintiffs do not seek active government support—monetary or otherwise—of their religious practices.

Although an exemption from development differs from the standard relief requested by a free exercise plaintiff, such limitations are not unknown in constitutional jurisprudence. Limitations on government control of public lands imposed by the guarantees of the first amendment have long been recognized in the concept of the public forum. For example, in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), this Court stated:



Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (government may not regulate use of its lands so as to discriminate against long-held first amendment rights); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious expression may not be excluded from public streets merely because it is "offensive").

The public forum doctrine has also been applied to protect religious practices. In *Kunz v. New York*, 340 U.S. 290, 293 (1951), the Court held that "the right of a municipality to control the use of public streets for the expression of religious views" is circumscribed by the first amendment, and invalidated an ordinance that had been used to convict an evangelical Baptist minister for speaking without a permit. Indeed, the Court has often used the public forum concept in analyzing cases with both speech and free exercise elements in general first amendment terms. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lovell v. Griffin*, 303 U.S. 444 (1938). The constitutional protection of first amendment activity that has taken place on public land "from time immemorial" naturally includes within its ambit not only speech and assembly, but also provides a guide for analysis of traditional Indian religions and worship, which have been observed at sacred sites for thousands of years in some instances. See generally, Note, *Indian Religious Freedom*, *supra*, at 1466-67 (arguing that public forum doctrine should apply to site-specific Native American free exercise claims).

Applied to this case, the public forum doctrine both clarifies the nature of the requested relief, and provides a useful limitation on the protection of sacred sites. As this Court pointed out in *Wisconsin v. Yoder*, 406 U.S.

at 226-27, where a religious way of life existed long before the state activity or regulation that threatens it, the free exercise clause protects the religious interest against all but the most compelling of state interests. A similar protection should apply to Native American claims to prevent destruction of sacred sites that existed long before the issue of title to the land was ever considered. Given a showing of infringement of belief, this analysis would hold, the free exercise clause would apply to current native religious practices at a particular site that predate European settlement or extinguishment of aboriginal title.<sup>4</sup> This "traditional worship" application of the public forum doctrine generally would exclude new religions from the ambit of site-specific constitutional protection. For example, under this theory, a person who claimed that the Lincoln Memorial was an incarnate god would not be entitled to preserve the Memorial from alteration or destruction: the public forum analogy protects those Native American religious practices, like the one at issue here, that have existed from "time out of mind." Note, *Indian Religious Freedom*, *supra* at 1466, n.90.<sup>5</sup> The tradition and history of worship at a particular site, given that the religious exercise involved may be performed only at that site, are analogous to the first amendment activities protected under the public forum rubric.

<sup>4</sup> Even if Native American worship at sacred sites began after installation on a nearby reservation, the doctrine would apply if the tribal presence is the result of unwilling migration or treaty compliance. In this light, the government should be estopped from denying a right to native worship at a site, if its own actions forced the worshipers to move to reservations.

<sup>5</sup> Further, if a religion had lapsed, and no active worship took place at a formerly sacred site, the public forum doctrine would not apply. Aside from issues of standing to raise the claims of adherents who no longer practice a religion, a sacred site would not be entitled to free exercise protection under the public forum doctrine analogy unless the history and tradition of worship was preserved by actual religious rites and rituals.

As this Court noted in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." The same respect for first amendment activity, which in this case can be meaningful only in an area that is both by long tradition and by government fiat open to the public, should apply to protect the very basis of Native American belief and worship.<sup>6</sup> To satisfy its burden, the government must show "strict incompatibility" with the claimed religious right. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. at 808. By contrast, the government's emphasis in its brief on limiting the Court's scrutiny to a mere "reasonableness" level, and on the existence of statutory "consultation" requirements, see Brief for Petitioner at 37-41; 34-36, does not approach the level of review mandated by the free exercise clause, and applied by this Court in all but the most exceptional circumstances.

<sup>6</sup> Contrary to the government's argument, the "logical implication" of applying the public forum doctrine to site-specific Native American free exercise claims does not mean that "all aspects of government's management of its property are subject to review under the public forum rubric." Brief for Petitioner at 33 n.27. As this Court has held, not all government property is open to the public, and in cases of a nonpublic forum, the doctrine obviously would not apply. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). Further, even when government property has been designated by government as open to the public for some purposes, but not for general access to engage in first amendment activity, a limited public forum exists. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*.

Thus it is in the context of the traditional public forum, see *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985), that the analysis proposed here would apply. In addition, the doctrine would of course apply if, for example, the government had allowed access for some kinds of religious activity, such as prayer meetings or Bible readings by religious groups, and then sought to destroy a sacred site. *Widmar v. Vincent*, *supra*.

Given that the religious activity here is essential to the continuity of the Native American religions practiced by the respondents, and that the activity takes place in the traditional public forum setting, the religious interests at stake should be protected against all but "those interests of the highest order," *Yoder*, 406 U.S. at 215, implemented by the least restrictive means possible. The clear absence of such a compelling interest in development dictates that the construction and logging be enjoined as violative of Native American free exercise rights.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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